

Exhibit B

Hearing Transcript, December 7, 2022

Page 1

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 22-10964-mg

4 - - - - - x

5 In the Matter of:

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7 CELSIUS NETWORK LLC,

8 Debtor.

9 - - - - - x

10

11 United States Bankruptcy Court
12 One Bowling Green
13 New York, NY 10004

14

15 December 7, 2022
16 9:00 AM

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19

20

21 BEFORE :

22 HON MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

Page 2

1 HEARING re Phase I of Hybrid Trial RE: Withhold Account
2 Holders. (Doc## 737, 745, 857, 914, 937, 951, 954, 988, 996,
3 1044, 1192, 1234, 1245, 1288 to 1293, 1338, 1360, 1369,
4 1370, 1411, 1465, 1531, 1532, 1550, 1563, 1567, 1571
5 to 1574, 1580, 1581, 1609, 1611, 662) Trial Scheduled for
6 12/7/22 and 12/8/22 starting at 9 AM each day. Case
7 Management Conference set for 11/22/2022 at 10:00 am.

8

9 HEARING re Hybrid Hearing RE: Motion Seeking Entry of an
10 Order (I) Authorizing the Debtors to Reopen Withdrawals for
11 Certain Customers with Respect to Certain Assets Held in the
12 Custody Program and Withhold Accounts and (II)
13 Granting Related Relief (Docket No. 670, 725, 753, 857, 914,
14 933, 937, 951, 954, 1043, 1058, 1292, 1293, 1311,
15 1312, 1565, 1574).

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 CLERK: (indiscernible).

3 MR. KOENIG: Good morning. We in the courtroom
4 can't hear you. We could hear you a moment before, but we
5 can't hear you anymore. It's sort of muffled.

6 CLERK: Can you hear me now?

7 MR. KOENIG: It's still pretty muffled, Deanna.

8 CLERK: All right. I don't know what to do, then.
9 (audio drops).

10 MR. KOENIG: Yeah, we're catching maybe ever third
11 word in the courtroom.

12 CLERK: (indiscernible), are you there? Hear me
13 now?

14 MR. KOENIG: Yes, Deanna, we could hear that a
15 little bit more clearly.

16 CLERK: Okay. I have my -- hopefully, this
17 recording goes well. I'm going to try to screen it so that
18 get it, but we'll see. It's just a thing. All right. If
19 you cannot hear me, just interrupt me, okay?

20 MR. KOENIG: Will do. It sounds much better now.
21 Thank you.

22 CLERK: Okay, thank you. All right, starting the
23 recording. You know what? I'll restart. Let me stop and
24 restart.

25 MR. KOENIG: Okay.

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1 (Recess)

2 CLERK: All right, starting the recording for
3 December 7th, 2022 at 9 a.m. Calling Celsius Networks, Case
4 No. 22-10964. Can we have the parties in the courtroom come
5 to the podium one at a time and give their appearances,
6 please.

7 MR. KOENIG: Good morning, Deanna. This is Chris
8 Koenig from Kirkland and Ellis on behalf of the Debtors.
9 I'm joined in the courtroom by my colleagues, Elizabeth
10 Jones and Simon Briefel.

11 CLERK: Okay, thank you. Is there any other
12 counsel in the courtroom?

13 MS. KOVSKY-APAP: Good morning, Deanna. Deb
14 Kovsky, Troutman Pepper, on behalf of the Ad Hoc Group of
15 Withhold Account Holders.

16 CLERK: Okay, thank you. Is the U.S. Trustee on
17 the call yet? All right, let's do it this way. One at a
18 time, the parties that need to make an appearance, please
19 raise your hand and I will ask you to unmute and you will
20 give your appearance. Please start doing that.

21 The parties on the -- on Zoom, please start
22 raising your hand so that we can take your appearance one at
23 a time. Can you hear me?

24 WOMAN 1: We can hear you.

25 CLERK: Okay, thank you. Link Smith, please

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1 unmute and take -- and give your appearance.

2 MR. SMITH: I'm here.

3 CLERK: Okay, please state now you're involved in
4 the case.

5 MR. SMITH: Creditor.

6 CLERK: Okay, thank you. (indiscernible) Butrym.

7 MR. BUTRYN: Here. I'm a creditor.

8 CLERK: Okay, thank you. Again, if you're
9 speaking on the record this morning only and you are wanting
10 (indiscernible) -- everyone that speaks at the podium,
11 please keep in mind that your conversations are being
12 recorded, so if you need to speak please try to go away from
13 the podium.

14 All right, going back to the participants on Zoom.
15 If you are speaking on the record this morning and you have
16 not given your appearance yet, please raise your hand so you
17 can give your appearance. Rebecca, please unmute and give
18 your appearance.

19 MS. GALLAGHER: Yes, this is Rebecca Gallagher and
20 I may be speaking.

21 CLERK: Thank you. And you are a creditor,
22 correct?

23 MS. GALLAGHER: Yes, I am.

24 CLERK: Thank you so much. All right, anyone else
25 that is speaking on the record this morning? Mr. Wedoff?

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1 MR. WEDOFF: Morning, Deanna. I do not believe I
2 will be speaking, but I am putting my appearance for the
3 examiner in case there are any questions.

4 CLERK: All right, thank you. All right, anyone
5 else that will be speaking on the record this morning,
6 please raise your hand so we can take your appearance.

7 Is anyone from the U.S. Trustee's office going to
8 be making appearance this morning? Shara, I know that I
9 admitted you. Is anyone speaking this morning?

10 Again, taking appearances for this morning's
11 hearing. Is anyone going to be speaking on the record this
12 morning? If you are and you have not given your appearance
13 yet, please raise your hands and I will ask you to unmute
14 and give your appearance.

15 MR. COLODNY: Hi, Deanna. This is Aaron Colodny
16 from White and Case on behalf of the Official Committee of
17 Unsecured Creditors. With me today is Sam Hershey, David
18 Turetsky, and Andrea Amulic.

19 CLERK: Okay, thank you, Aaron. Is there anyone
20 else that will be speaking on the record this morning and
21 needs to make an appearance?

22 MR. ORTIZ: Hi, Deanna.

23 CLERK: Okay --

24 MR. ORTIZ: In the courtroom, it's Kyle Ortiz of
25 Togut Segal for the Ad Hoc Group of Custodial Account

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1 Holders. I'm here with my colleague Brian Collier.

2 CLERK: Okay, thank you. .

3 MR. ORTIZ: Thank you.

4 MS. CORNELL: Morning, Deanna. You have Shara
5 Cornell here with the Office of the United States Trustee.

6 I believe that my colleagues, assistant United States
7 Trustee Linda Rifkin and Mark Bruh will also be joining
8 virtually today.

9 CLERK: Okay, thank you.

10 MS. CORNELL: Thank you.

11 CLERK: There any additional participants that are
12 joining that have not given their appearance yet?

13 Again, for the parties that have joined, if you're
14 going to be speaking on the record this morning and you have
15 not given your appearance, please raise your hands and I
16 will ask you to unmute one at a time and give your
17 appearance.

18 All right, again, for the parties that have
19 joined, if anyone is (audio drops) their appearance this
20 morning, is speaking on the record and had not given their
21 appearance yet, please unmute your line. Please raise your
22 hand, I'll take your appearance, and I'll ask you to unmute
23 and give your appearance.

24 Good morning, Mark.

25 MR. BRUH: Good morning, Deanna. Mark Bruh for

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1 the United States Trustee. I'm not sure if we'll be
2 speaking, but I just wanted to note our appearance.

3 CLERK: Okay, thank you, and Shara also gave her
4 appearance as well.

5 MR. BRUH: Okay, great. Thank you, Deanna.

6 CLERK: All right. Again for the parties that
7 have joined, please raise your hand, use the raise hand
8 function if you're going to be speaking on the record this
9 morning and I will ask you to unmute one at a time and give
10 your appearance.

11 Yes, Victor, please unmute and give your
12 appearance.

13 MR. UBIERNA DE LAS HERAS: Good morning, Deanna.
14 I'm Victor Ubierna de las Heras, pro se creditor, and I'll
15 be speaking today on the record.

16 CLERK: Thank you. All right, for the parties
17 that have joined, are there any participants that are
18 speaking on the record this morning that have not given your
19 appearance? Please use the raise hand function to give your
20 appearance. I'll ask you to unmute one at a time.

21 All right, for the parties that have joined, if
22 anyone is speaking on the record today and has not given
23 their appearance, please use the raise hand function and I
24 will ask you to unmute one at a time and take your
25 appearance.

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1 All right, for the parties in the courtroom, when
2 are -- is the witness going to be joining?

3 MR. KOENIG: Deanna, it's Chris Koenig from
4 Kirkland for the record. The parties agreed to a
5 stipulation that --

6 COURT OFFICER: All rise.

7 THE COURT: Please be seated. Just give me a
8 chance to refresh my computer.

9 All right, good morning. We're here in connection
10 with the Ad Hoc Group of Custody Account Holders and Hold
11 Account Holders with respect to the phase one issues. Let's
12 start with the Custody Account Holders. Mr. Ortiz?

13 MR. ORTIZ: Good morning, Your Honor. Kyle Ortiz,
14 Togut Segal and Segal on behalf of the Custodial Account
15 Holders. Your Honor, I think it might be worthwhile just to
16 do the quick housekeeping for the group.

17 I think you probably saw the stipulation was filed
18 the way that the parties had set it up and I think the
19 intent for the day is that they're going to divide the two
20 issues and Custody would -- and Withhold would go, Debtors,
21 the Committee, and then response and then the same thing for
22 the follow-up question of if it's not property of the
23 estate, what does that mean for whether or not the Debtors
24 can hold it? So I just want to make sure we're all on the
25 same page on that, Your Honor.

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1 THE COURT: Okay. So I saw on the docket this
2 morning that the joint -- I think what you're talking about
3 is the joint stipulation and agreed order by and among the
4 Debtors, ad hoc groups, and the Official Committee of
5 Unsecured Creditors regarding the phase one issues here.

6 MR. ORTIZ: That's correct, Your Honor.

7 THE COURT: Okay. It's approved.

8 MR. ORTIZ: All right, thank you, Your Honor. So
9 to get into the substance, the first question is whether or
10 not the custodial assets are property of the estate. And
11 Your Honor, we're five months into the case and you've been
12 hearing a lot about this for all of those five months and
13 it's been extensively briefed. So we're going to try to be
14 relatively brief particularly on this issue and obviously
15 any questions you have and then we'll respond to the other
16 parties because I think this is a somewhat interesting case,
17 at least for the Custody account holders in that we're --

18 THE COURT: Especially --

19 MR. ORTIZ: -- instance where all of the parties
20 are in agreement.

21 THE COURT: Hang on a second. Anybody who is
22 tuned in on Zoom needs to mute their line or you will be
23 disconnected from the hearing. Just please mute your, the
24 sound on your line. Go ahead, Mr. Ortiz.

25 MR. ORTIZ: Thank you, Your Honor. Again, for the

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1 record, Kyle Ortiz of Togut Segal for the Custodial Account
2 Holders.

3 So I was saying, Your Honor, this is the rare
4 instance where we're standing in a courtroom for a contested
5 hearing where we actually all agree on this point. At
6 least, we agree with the Debtors a hundred percent. I think
7 we agree with the Committee. The precise number is 94
8 percent of the way that the Custody assets are, by the clear
9 and unambiguous terms of the terms of use, property of the
10 custodial service users and not property of the estate,
11 which makes that pretty unique.

12 Most of the case law we're looking at, somebody
13 thinks that the contract says something different or that
14 the intent that they all claim they had at the beginning was
15 different than various parties are saying. Here, we have
16 unambiguous language with unambiguous agreement.

17 THE COURT: Let me just stop you, just so we're
18 clear. I approved the stipulation and that's Paragraph 3 of
19 the stipulation, dealt with the -- all of the exhibits and
20 declarations that were submitted and it was agreed in the
21 stipulation it was all admissible and it is all -- just to
22 be clear for the record, that's all admitted into evidence.
23 But go ahead. I didn't mean to interrupt you.

24 MR. ORTIZ: No, no worries, Your Honor. I think
25 that's important and appreciate the clarification.

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1 So I'm going to just briefly focus, because we
2 have that 94 percent agreement, on that 6 percent where we
3 do have disagreement and that really relates to a small
4 subset that were subject to pending withdrawals at the time
5 of the freeze that essentially caused them to be overlooked
6 in the Custody wallet rebalancing effort that occurred prior
7 to the petition date.

8 I'll just cut to the chase, Your Honor. Frankly,
9 we don't think that that distinction matters because the
10 subjective intent of the parties, the Debtors and the
11 account holders was to maintain a custodial account
12 relationship. When we look at the case law in custodial
13 accounts like Judge Posner's Joliet-Will case, says that
14 that relationship is established by contract and depends on
15 the terms under which the transfers were made and the
16 relationship between the parties.

17 Here, once the customer, whether they were
18 transferring from completely outside the platform or
19 transferring from another service on the platform, makes the
20 requests to transfer assets to the Custody service, such
21 transfer is reflected immediately on the Debtors' internal
22 ledger and the user's account also reflects that and at that
23 point, this custodial relationship is forged, Your Honor.

24 The subjective intent of the parties in that
25 moment is that the Debtors have no colorable claim for title

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1 over assets held in Custody on their ledger as Custody
2 assets. In our view, the movement of assets between wallets
3 does not impact that relationship. The parties have
4 contracted that the user will transfer digital assets to the
5 Debtor. The Debtor will hold them or digital assets of the
6 same sort -- I actually think that's important. I'll get to
7 that -- in Custody for the user and there is of course
8 consequence to that.

9 What the user gets is a safe place to hold it, but
10 it gets nothing else. It doesn't get interest. It doesn't
11 get the ability to earn anything and the location of those
12 assets within the Debtors' larger system and how they store
13 them when it's all on the ledger as custodial, in our view,
14 is no more relevant, Your Honor, than in the fungible
15 commodity context with the location of your specific
16 hydrocarbon within a pipeline where it's always agreed that
17 it's your title.

18 So particularly here where we have a contract that
19 is very clear that you don't get back the exact same coin,
20 but get back a coin of the same kind, I think that makes it
21 no different than the Enron case or the Marchin case with
22 the bonds where as long as you can get back the same thing,
23 which makes, you know, obviously perfect sense in the
24 fungible commodity context, you could never track and write
25 your name on a hydrocarbon and pull it out of the pipeline

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1 at the other end, but everybody agrees that you hold title
2 throughout and that was our contractual agreement. That was
3 the intent of the parties and you're --

4 THE COURT: Let me just --

5 MR. ORTIZ: Of course, Your Honor.

6 THE COURT: Your position is that the internal
7 ledger of selling Celsius accurately reflects the -- we'll
8 call them the Custody assets, whatever wallet they were in,
9 your position is that the internal ledger itself is the
10 document that actually reflects what assets belong to the
11 Custody account holders?

12 MR. ORTIZ: That's correct, Your Honor, and that's
13 what we believe is the subjective intent of the parties.

14 And again, you have a situation that's a little bit unique
15 in that both parties are going to stand up and say they
16 intended the exact same thing, which is an unusual situation
17 and I do think that is what makes the difference. And maybe
18 it's easiest to look at it through the context of what we
19 call or what the Debtors have called kind of pure Custody.

20 Because that person who was coming from completely
21 outside the system, the moment they sent assets to the
22 Debtors to hold them in Custody, they formed this custodial
23 relationship and there was never any other type of
24 relationship that these parties would ever have, and that's
25 kind of the simplest way to look at it. They put it in what

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1 essentially is a big tanker of custodial coins, of digital
2 assets, and they have an agreement that someday they'll be
3 able to pull out of that big tanker, some digital assets of
4 the exact same kind, which I think really makes it squarely
5 like Enron.

6 That was our intent. That was their intent. So
7 that's why we think that we should be in 100 percent
8 agreement instead of 96 percent agreement.

9 THE COURT: When you say it was the intent, what
10 contract language, if any, are you relying on to say that
11 reflects what you describe as the intent? Because I mean,
12 am I supposed to -- is extrinsic evidence relevant to this?
13 What extensive evidence do I have? But let's start with,
14 what are the contract terms that you believe support your
15 argument?

16 Let me just as an aside for Ms. Kovsky, one of the
17 -- when we get to the issue of Withhold, that's one of the
18 things that I'm sort of struggling with is there are -- are
19 there contract terms, written contract terms that govern it
20 and what happens in the absence of written contract terms?

21 But I didn't mean to push you off your argument,
22 but on this point, that's why I'm asking, what are the --
23 are there specific written contract terms that you're
24 relying on as reflecting what you describe as the intent of
25 the parties?

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1 MR. ORTIZ: Right, Your Honor, and you didn't
2 throw me off my argument. I was actually done with my
3 argument on this particular matter, because we're not trying
4 to -- I know you've had a lot of paper and been in Court a
5 lot the last --

6 THE COURT: It's been a busy week.

7 MR. ORTIZ: So we're trying to keep it relatively
8 focused. I mean, look, you can look at, its section, I
9 guess, 4(b) talks about Custody. And I think first, the
10 fact that the section is --

11 THE COURT: We're talking about Version 8?

12 MR. ORTIZ: Yeah. I'm sorry, Your Honor. The --
13 I guess that would be Version 8, April 14th, 2022 Terms of
14 Use.

15 So I think when you're looking at intent, you
16 know, you could start with the fact that it's in a section
17 called Custody. The intent was that this would be a
18 custodial relationship. It says that that service allows
19 you to store eligible digital assets and I'll acknowledge it
20 says in a Custody wallet. But it's not just that it's in a
21 wallet. It is also that you will not receive any financing
22 fee. You will not receive rewards. You're not going to
23 receive financial compensation (indiscernible) any time, and
24 there's -- I think when you look at the intent, it's clear
25 that it's not going to necessarily be specifically in that

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1 Custody wallet because you might have a third party
2 custodian that is mentioned in there.

3 And the -- when we talk about whether we want to
4 look at subjective intent and you look at the declaration
5 that the Debtors put in, they talk about how they handled
6 this initially and they had a practice of --

7 THE COURT: You're talking about Mr. Blonstein's -

8 -

9 MR. ORTIZ: Mr. Blonstein's declaration that it's,
10 you know, initially, immediately reflected on an internal
11 ledger and that there is a periodic manual rebalancing. And
12 I don't think if you took out the word Custody wallet
13 everywhere it showed up, you could still have this section
14 read much like it reads today. You know, the fact that the
15 Debtors attempted to set up Custody wallets and try their
16 best to segregate assets at all times doesn't actually
17 matter for purposes of what you need to do to create a
18 custodial relationship under the case law.

19 In some senses, they -- I don't think anyone is
20 going to say differently. There was a lot of scrambling at
21 the time of trying to set up a program --

22 THE COURT: -- set up the Custody program. They
23 were scrambling and --

24 MR. ORTIZ: Right.

25 THE COURT: The state regulators were on their

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1 back about it and --

2 MR. ORTIZ: Right, but --

3 THE COURT: They weren't ready to go.

4 MR. ORTIZ: Terms of use, exactly that the Debtors
5 -- and not just people who participated in the Custody
6 program, but everybody who was using their service anywhere
7 acknowledged that this was going to be a new service and
8 that the stuff in that program, in that service, was going
9 to be considered to be custodial assets by both the Debtors
10 and the users. And you know, they at times attempted to
11 have a cushion. And their ability as we -- what we all
12 acknowledge, it was somewhat frantic time to check their
13 ledgers and make sure that they were keeping things in --

14 THE COURT: Was the rebalancing that they --

15 MR. ORTIZ: Rebalancing didn't always keep up and
16 really the only reason that these particular assets were
17 missed, interestingly enough, Your Honor, is because they
18 were -- had requested withdrawal. So the only reason they
19 didn't show up as needing to be rebalanced is because they
20 were in the Debtors' ledger on the way back to the customer.
21 Of course, they saw that. I think it's interesting that
22 some of that stuff was put back post-petition. I think
23 that's for another day.

24 THE COURT: Can you give me an estimate of the
25 value of the assets where account holders sought to withdraw

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1 assets from Celsius rather than just keep them in Custody?

2 MR. ORTIZ: I want to make sure I understand your
3 question. So --

4 THE COURT: Because you're --

5 MR. ORTIZ: The shortfall --

6 THE COURT: You head down this -- one, stop.

7 MR. ORTIZ: Sorry.

8 THE COURT: We headed down this road because you
9 said there's a disagreement about pending withdrawals and
10 that's what my question, maybe inadvertently, was trying to
11 focus on. Approximately what was the value of the pending
12 withdrawals that never actually took place?

13 MR. ORTIZ: Yeah, Your Honor. My understanding
14 and I'm sure one of these gentlemen behind me will correct
15 me if I'm wrong, is that it was in the neighborhood \$15 to
16 \$16 million, which is roughly 6 percent of the kind of total
17 amount of Custody assets.

18 THE COURT: That's all right. You can go --
19 somebody else will have a chance to --

20 MR. ORTIZ: But yeah, so -- and that one, again,
21 was stuff that had been tracked and the only reason it
22 wasn't then they looked to rebalance before the petition
23 date, they didn't see it was because it had moved to a
24 ledger that said, this is on the way to the customer. So it
25 was -- they were that close. But the intent was always that

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1 that would be Custody and when they returned it, it reflects
2 again in the customer's accounts as Custody.

3 So we do think under the contract that it was --
4 that the clear intent was to create a custodial
5 relationship. The debtors made their best efforts to go the
6 extra step of having segregated wallets, which again, I
7 don't think under Joliet-Will or the other caselaw we've
8 seen is actually a necessary step. It was a nice step and
9 hopefully, you know, the customers aren't punished for that.
10 But again, I think if you look back at the simplest case of
11 someone who came from off the platform all together as a
12 pure Custody, if they were to come into this program and
13 then seek to withdraw and be one of the people who got
14 trapped in that little pending withdrawal group, the only
15 relationship they ever had was Custody.

16 THE COURT: The cases that you're relying on, on
17 this point about you don't need segregated Custody wallets,
18 what you said was Judge Posner decision?

19 MR. ORTIZ: Yeah, Justice Posner's decision in
20 Joliet-Will and, you know, Your Honor, it's somewhat
21 interesting, there's not as much caselaw as we expected on
22 the concept of Custody generally, but it's interesting
23 because Custody is almost a larger concept that underneath
24 you have additional concepts like Bailey's and special
25 deposits and trusts and other things, but in a very basic,

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1 just creating a custodial relationship, it was looking at --
2 I think again, yeah, the -- what the contract says, the
3 terms under the transfers and then the relationship that was
4 forged between the parties, and again, I think that's a very
5 important point, that it's really the moment that you say,
6 I'm going to transfer something to the Custody program that
7 the custodial relationship is forged.

8 And a lot of the stuff that some of the caselaw
9 that's has been cited by other parties that's talking about
10 trust and when you -- Your Honor asked about the lowest
11 intermediate balance test, all that stuff really comes into
12 play if there was a universe where if I go back to the
13 pipeline example or the oil tanker or the, you know, gas
14 tanker, is if somehow there's a leak and there just wasn't
15 enough for everybody.

16 That only really comes into play if we ever dip
17 below that, but we're only talking about \$16 million, Your
18 Honor, so I don't think that really comes into play in the
19 context of there was never a time when the assets and the
20 digital assets that the Debtors held dipped below what they
21 were saying they were holding in Custody program.

22 So that's all I have initially, unless you have
23 questions, Your Honor, and then we'll respond to the other
24 parties.

25 THE COURT: I don't have any questions. Okay.

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1 MR. ORTIZ: Thank you, Your Honor.

2 THE COURT: All right. I thought that -- what did
3 you work out that -- Withhold --

4 MR. ORTIZ: I thought we were splitting Custody
5 and Withhold. I'm happy for you to go.

6 MS. KOVSKY-APAP: I -- we can go either way, but I
7 (indiscernible) Custody, Withhold --

8 THE COURT: I'm happy to -- did you work this out,
9 how you were going to do it?

10 MS. KOVSKY-APAP: Yeah, it was late last night,
11 Your Honor.

12 MR. ORTIZ: We --

13 MS. KOVSKY-APAP: In Paragraph 4 of the
14 stipulation we filed last night at ECF 1623 --

15 THE COURT: Yes, I have it in front of me.

16 MS. KOVSKY-APAP: Yes.

17 MR. ORTIZ: We split it --

18 MS. KOVSKY-APAP: We go property issue with
19 Custody assets, Custody ad hoc group, Debtors, Committee,
20 Custody ad hoc group.

21 MR. ORTIZ: And then withdrawers. I'm happy to --

22 THE COURT: Go ahead.

23 MR. ORTIZ: We did sort of change it last night.

24 MR. KOENIG: Good morning, Your Honor. For the
25 record, Chris Koenig of Kirkland and Ellis for the Debtors.

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1 Your Honor, the Debtors have been evaluating their
2 cryptocurrency -- whether their cryptocurrency assets are
3 property of the estate in various contexts. On Monday, we
4 were talking about Earn. Today we're talking about Custody
5 and Withhold. We don't take this issue lightly. This is a
6 key gating --

7 THE COURT: You seem to swap your -- change your
8 position between your opening brief and reply, though.

9 MR. KOENIG: Your Honor, what I would say is we
10 were focused on our opening brief on pure Custody -- pure
11 Withhold. This is with respect to Withhold. I don't --

12 THE COURT: Yes.

13 MR. KOENIG: -- think that we've changed our
14 position on --

15 THE COURT: Okay. Go ahead with your argument.
16 We'll --

17 MR. KOENIG: Sorry, Your Honor. Today we're
18 talking about Custody and Withhold. We don't take this
19 issue lightly because the outcome of this issue with respect
20 to any one program necessarily affects the other programs
21 and the other customers. If certain cryptocurrency in one
22 program is not property of the state, that means one less
23 digital asset that could be property of the estate and
24 shared ratably among all unsecured creditors.

25 The way that the Debtors have analyzed this issue

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1 in every situation and every program has been to evaluate
2 the plain language of the terms of use. And as Mr. Ortiz
3 explained, the Debtors, the Custody Ad Hoc Group and the
4 Committee agree that as a threshold matter, the terms of use
5 are clear and unambiguous that Custody assets are not
6 property of the estates.

7 But the open question is, what are the Custody
8 assets? Is it just those cryptocurrency assets that today
9 are in the Custody fire blocks workspace or is it all assets
10 that are designated in the Debtors' books and records as
11 Custody assets? So I'll focus on the language that Your
12 Honor was asking Mr. Ortiz about because it does say in many
13 places Custody wallet.

14 But what I want to focus on in Section 4(b) and
15 this is at the bottom of the page. This is at the bottom of
16 the page, the Version 8 of the terms of use was filed at
17 docket No. 393 and I'm referring to Page 533 of 1126 on the
18 top.

19 THE COURT: Give me a -- let me get his open on my
20 screen.

21 MR. KOENIG: I'm sorry, Your Honor. Your Honor, I
22 also have a binder with the relevant language, if --

23 THE COURT: Yeah, that would make my life easier.

24 MR. KOENIG: May I approach?

25 THE COURT: Yeah, come up. All right, so that

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1 we're all on the same place, Mr. Koenig has given me ECF
2 Docket No. 393 at Page 533 of 1126.

3 MR. KOENIG: That's correct, Your Honor. And
4 we've all been reading the language very carefully, as I'm
5 sure you have. And the way that we square the circle here
6 is at the bottom of the page, the language, the last
7 sentence on this page, Page 533, says "Eligible digital
8 assets in a Custody wallet may be commingled with the
9 eligible digital assets of other users and Celsius is under
10 no obligation to return the actual eligible digital assets
11 initially transferred by you to a Custody wallet" -- and
12 then here's the key language -- "but will return eligible
13 digital assets of the identical type reflected in your
14 Celsius account at the time you request such a return."

15 It doesn't say of the identical type reflected in
16 your Custody wallet. It says of the type reflected in your
17 Celsius account. And so we think that that, Mr. Ortiz --

18 THE COURT: -- Celsius account, in your view, is
19 the internal ledger --

20 MR. KOENIG: That's right.

21 THE COURT: -- that Celsius was maintaining?

22 MR. KOENIG: That's right, Your Honor. And what's
23 more, the Committee's position that only the assets that are
24 actually in the Custody wallet, the Custody fire blocks
25 workspace, I mean, are property of the customers could lead

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1 to an absurd result. What if the Debtors never performed
2 any reconciliation despite promising to do so in the
3 agreement? That doesn't seem --

4 THE COURT: Well, may I -- is their agreement
5 among the parties to this dispute that the internal ledger
6 is accurate?

7 MR. KOENIG: I've heard no such dispute. I don't
8 want to speak for the other parties but I don't believe that
9 that was raised --

10 THE COURT: I take it, Mr. Ortiz, that you agree
11 with that? You have to answer audibly.

12 MR. ORTIZ: Yes, Your Honor.

13 THE COURT: Okay. And what about the Committee?
14 I don't know who's going to speak for the Committee.

15 MS. AMULIC: Yeah, we agree.

16 THE COURT: Yeah. Just state your name.

17 MS. AMULIC: Oh, sorry. Andrea Amulic for the
18 Committee.

19 THE COURT: Thank you. Okay. Okay.

20 MR. KOENIG: So Your Honor, that's really the --
21 again, Chris Koenig for the Debtors. Your Honor, that's the
22 way that we have read the language.

23 THE COURT: That's what I was understanding as
24 well, but I just want to make sure we're all on the same
25 page.

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1 MR. KOENIG: Right. Right. And so the language
2 that I just cited from the terms of use is the way that we
3 read, you know, Mr. Ortiz was talking about how, you know,
4 the language really reads the same if you don't read Custody
5 wallets and there's language in here that doesn't mention
6 Custody wallets. So you don't even have to read it out of
7 the language. It's already not in that language in that
8 way.

9 So how -- was there a designation of a specific
10 line? I don't know which, what ledger. Is this the general
11 ledger? What ledger of the Debtors reflected these
12 balances?

13 MR. KOENIG: Your Honor, Mr. Blonstein talked
14 about the ledger generally and how --

15 THE COURT: I know, but I couldn't figure out, you
16 know, there could be lots of pages of a ledger on a screen.

17 MR. KOENIG: It is many pages on the screen and
18 its many lines and many pages and we've produced that some
19 of the parties here.

20 THE COURT: Does it have a label, that line?

21 MR. KOENIG: Yes, it does, that it's, you know --

22 THE COURT: Somebody know what it is?

23 MR. KOENIG: Yeah, that it would designate the
24 user and the transaction and how it's to be recorded in the
25 company's books and records. And then that ledger was used

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1 to update the app that each customer saw that said I
2 transferred one Bitcoin from Earn to Custody. And as Mr.
3 Blonstein testified, the transaction occurred immediately on
4 the ledger and in the app, but of course it didn't --

5 THE COURT: Reconciliation --

6 MR. KOENIG: The reconciliation --

7 THE COURT: -- later, but --

8 MR. KOENIG: Correct.

9 THE COURT: -- the actual, what you're telling me
10 is that the actual transaction was recorded virtually
11 simultaneous with the -- when the transaction was intended
12 to occur.

13 MR. KOENIG: And immediately and automatically
14 pursuant to the Debtors' technology.

15 THE COURT: All right. Okay.

16 MR. KOENIG: And so --

17 THE COURT: Somebody could hit on their phone or
18 their app, on their laptop, or whatever and when they made
19 that change, it was instantly reflected in the Debtors'
20 books and records?

21 MR. KOENIG: That's correct, Your Honor. And
22 again, this all goes back to whether there's contractual
23 language because I'm sure Ms. Kovsky is going to stand up
24 and say well, everything that Mr. Koenig just said is
25 exactly the same for Withhold. We'll get to that, but you

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1 know, just to be clear, we're only arguing this because
2 there -- we believe that there is clear language on Custody
3 that Custody is not property of the estate and that the
4 ledger, you know, enforces that the parties in --

5 THE COURT: Okay.

6 MR. KOENIG: Your Honor, I'm not going to repeat
7 everything that Mr. Ortiz said. I think we're largely in
8 agreement with Mr. Ortiz, so I'll cede the lectern to
9 counsel for the Committee, unless you have any further
10 questions for me.

11 One other thing, Your Honor. I apologize. You
12 asked Mr. Ortiz about the size of the pending withdrawals.
13 We agree that it's around 15 to 16 million, just for the
14 record. Wanted to confirm that.

15 THE COURT: Okay. Who am I going to hear, from
16 the Committee? Mr. Hershey.

17 MR. HERSHLEY: Good morning, Your Honor. Sam
18 Hershey from White and Case on behalf of the Official
19 Committee of Unsecured Creditors.

20 I'll just note that I'm joined at counsel table
21 with my colleague Andrea Amulic who will be handling the
22 argument regarding the Withhold issues.

23 Your Honor, Mr. Ortiz began his presentation by
24 saying he agrees with the Committee 94 percent of the way.
25 I actually think it might be more than that. I was

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1 surprised how much I agree with much of what Mr. Ortiz had
2 to say.

3 THE COURT: Record that, Mr. Ortiz, for the next
4 case. Okay?

5 MR. HERSHLEY: Our disagreement is going to come
6 soon. Specifically, Mr. Ortiz doesn't argue that the terms
7 of use are ambiguous. I think we all, everyone here agrees
8 they're clear and unambiguous. Yet at the same time, he
9 argues that we should look at --

10 THE COURT: -- opposed to yesterday morning when
11 all I heard was --

12 MR. HERSHLEY: Correct, Your Honor. We finally
13 have agreement on this point among this group. He at the
14 same time argues, though, that we should look at the pre-
15 petition practices of the Debtors to determine what the
16 parties intended. Those two points are mutually
17 inconsistent. We should not look at the pre-petition
18 practices of the Debtors. We look solely under New York law
19 to the terms of the agreement.

20 THE COURT: I don't consider extrinsic evidence.

21 MR. HERSHLEY: Thank you, Your Honor.

22 THE COURT: But what's the point? What's the
23 issue where -- is there a substantive issue that you
24 disagree with Mr. Ortiz?

25 MR. HERSHLEY: Well, having read the examiner's

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1 report, Your Honor, I don't really see how looking at pre-
2 petition practices is going to help his clients, frankly. I
3 think that we all know that the pre-petition accounting
4 practices and ledger entries were a mess and were not
5 reliable or accurate. So that's really his argument to make
6 if he thinks -- you're not going to look at the extrinsic
7 evidence, so we won't hear the argument, but no, I don't
8 think that if we looked at pre-petition practices, they
9 would support his clients, but fortunately we don't have to
10 go there.

11 I'll go right to the terms of the agreement that
12 everyone agrees governs and is unambiguous. So let's start
13 with Section 4(b) and I'm again looking at Version 8 which
14 is the April 14th, 2022 terms of use, and just to be crystal
15 clear, this is PDF Page 533, Docket No. 393. And this
16 provision's already been mentioned. It provides the Custody
17 account holders' ownership interest in assets in Celsius'
18 possession extends only so far as the assets actually held
19 in Custody wallets, and I'll just read the provision.

20 "Title to any of your eligible assets in a Custody
21 wallet shall at all times remain with you and not
22 transferred to Celsius." Now, Mr. Ortiz actually mentioned
23 this section. He said, well if we remove the term Custody
24 wallet, it would generally have the same meaning, but we
25 can't remove the term Custody wallet. It's there for a

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1 reason and it matters because Custody wallet is actually a
2 defined term in these terms of use. If Your Honor turns to
3 page -- PDF Page 527 of the same document --

4 THE COURT: Just give me a second.

5 MR. HERSHHEY: Yeah, take your time, Your Honor,
6 under the definition section.

7 THE COURT: Okay.

8 MR. HERSHHEY: Okay. Your Honor will see the
9 definition. "Custody wallet means a virtual wallet where
10 all eligible digital assets held therein are custodial
11 assets maintained either by us or a third party institution
12 or other entities selected by Celsius." So in other words,
13 Custody wallets means a specific type of wallet and only
14 that type of wallet. And the definition of Custody wallet
15 reinforces that custodial assets are eligible digital assets
16 held in a virtual Custody wallet. It's not the internal
17 ledger. It's not some other wallet. It's the Custody
18 wallets. Okay.

19 Now there's one more term in the terms of use that
20 I would like to highlight and I have to ask Your Honor to
21 turn back actually to Page 533 which is the Custody section
22 of the terms of use. Let me know when Your Honor --

23 THE COURT: I'm there.

24 MR. HERSHHEY: Okay. So the terms of use after
25 saying that only assets in Custody wallets are Custody

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1 assets, the terms of use go on to say that the Custody
2 account holders and solely the Custody account holders bear
3 the risk of Celsius losing their assets, and I'll quote from
4 the terms of use. "As title owner of the assets, you bear
5 all risks of loss. Celsius shall have no liability for any
6 digital asset price fluctuations or any or all loss of
7 digital assets."

8 So we're in the exact situation contemplated by
9 the terms of use. There has been an approximately \$15
10 million loss of digital assets in the Custody wallets. The
11 Custody group argues that they can force Celsius' other
12 customers to cover that loss by claiming ownership over
13 assets outside the Custody wallets. There is simply no
14 support for that position in the plain language of the terms
15 of use.

16 To the contrary, the terms of use make crystal
17 clear that Custody account holders bear the sole risk for
18 any loss and can only look to the Custody wallets, the
19 assets to which they have title. Now, in an effort to avoid
20 that plain language, the Custody group points its response
21 brief and Mr. Ortiz's presentation to a series of cases to
22 argue their agreement with Celsius is like a bailment or is
23 like a special deposit which gives them ownership rights
24 beyond what they bargained for.

25 And so the Custody group's argument seems to be --

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1 I think I heard this in Mr. Ortiz's argument -- that once
2 parties agree to a custodial relationship, all other terms
3 of the contract cease to matter, terms that limit or define
4 the custodial relationship, like the ones I just read, can
5 simply be ignored. There's a custodial --

6 THE COURT: Can you put this in dollar terms?

7 What was the value of assets in Custody wallet at the
8 petition date and what's the delta that was reflected in the
9 ledger, not reflected in the Custody wallet?

10 MR. HERSHAY: So the delta, as I understand it,
11 Your Honor, is \$15 million.

12 THE COURT: What's the total?

13 MR. HERSHAY: I actually am not -- I don't know if
14 any of my team or the Debtors know the total.

15 THE COURT: Can somebody help me on that?

16 MR. COLODNY: I believe it's 220 --

17 THE COURT: Who is speaking?

18 MR. COLODNY: This is Aaron Colodny --.

19 THE COURT: Just come to the microphone, Mr.
20 Colodny. Just so we're sure.

21 MR. COLODNY: Aaron Colodny, counsel for the
22 Official Creditors Committee. I believe it's around \$200 to
23 \$220 million.

24 THE COURT: Okay.

25 MR. HERSHAY: And if I were better at math, Your

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1 Honor, I could've divided \$15 million by 94 percent and
2 gotten there, but fortunately Mr. Colodny was able to help
3 me out.

4 So anyway, the Custody group offers no authority
5 to support the proposition that once a custodial
6 relationship is formed the other terms of the contract can
7 be ignored. In fact, the case that they principally rely on
8 which is the Joliet-Will case, says specifically that the
9 answer as to how to treat assets in the Debtors' possession,
10 whether they are held in Custody or not -- and I'm going to
11 quote -- "depends on the terms under which the grants were
12 made." That's the Joliet-Will case. The pincite is 432.

13 THE COURT: That's Judge Posner's --

14 MR. HERSHHEY: That's Judge Posner's decision.

15 Exactly, Your Honor. So here the terms as I said plainly
16 provide --

17 THE COURT: What's the cite of his opinion --

18 MR. HERSHHEY: O, you want me to give the full
19 cite, Your Honor?

20 THE COURT: Yeah.

21 MR. HERSHHEY: It's In re Joliet-Will County
22 Community, I believe, Action Agency, 847 F.2d 430, pincite
23 432 (7th Cir. 1988).

24 THE COURT: Okay, go ahead.

25 MR. HERSHHEY: And indeed in that case, I'll just

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1 note, the Court did in fact look at the terms of the grant
2 to determine whether the assets were held in a custodial
3 relationship. Your Honor, the terms here plainly provide
4 Custody account holders' ownership interest is limited to
5 assets in Custody wallets.

6 The last thing I'll say Your Honor before ceding
7 the podium is if Your Honor looks at the terms of use again,
8 the term Custody wallet is used with intention. It's used
9 repeatedly to refer to where the assets are held by the
10 Debtors. Now turning to the language that Mr. Koenig cites,
11 that does not expand or change the custodial relationship.
12 That merely repeats the same promise that Celsius made to
13 every customer. We're going to give you back like assets,
14 may not be your assets. Right? That's what every customer
15 claims the right to here and is going to, you know, assert a
16 proof of claim for.

17 That language, just as it doesn't create a
18 custodial relationship for all other Celsius customers,
19 doesn't create a custodial relationship for these Celsius
20 customers. That custodial relationship is created by the
21 plain language providing that the Custody wallet holds their
22 assets and only the Custody wallet.

23 Unless Your Honor has any other questions, I'll
24 cede the podium.

25 THE COURT: Thank you.

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1 MR. HERSHY: Thank you very much.

2 THE COURT: All right. Is there anyone else who
3 is speaking to the issue of the Custody account holders? I
4 guess we move to Withhold. Are you --

5 MR. ORTIZ: I think we have a brief reply, but --

6 THE COURT: Go ahead.

7 MR. ORTIZ: I don't know if you want to do --

8 THE COURT: That's fine. I do. I do want to hear
9 it, Mr. Ortiz.

10 MR. ORTIZ: So I just wanted to note a couple of
11 things in response to the 6 percent that we have our
12 disagreement on. Counsel pointed to the definition of
13 Custody wallet and if you look at that definition, Your
14 Honor --

15 THE COURT: That's back on 527 of 1126?

16 MR. ORTIZ: Yeah, five -- back on 527 of Docket
17 393. It doesn't go as far as counsel says it does because
18 it -- means a virtual where all digital assets held therein
19 are custodial assets maintained either by us or by a third
20 party institution or other entities selected by Celsius.
21 That just says that if it's a Custody wallet, that -- to be
22 a Custody wallet, it has to have only assets that are
23 custodial assets. It doesn't say that that is the only
24 place a Custody asset could be. So I don't think that
25 definition necessarily changes the analysis that we made.

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1 And then I would also point to the concept in the
2 terms of use that we as title owner bear all the risk of
3 loss. I mean we're either a title owner or we're not. If
4 not, we're the title owner and we bear all risk of loss,
5 then you are acknowledging that we have title over those
6 assets. If you're going to point to that section, then
7 we're the ones that actually have title at that time to bear
8 risk of loss, which I think in any event that's probably a
9 misuse of that language. I think that language is really
10 acknowledging that this is a asset that has a market
11 fluctuation. But in any event you can't --

12 THE COURT: Let me ask you a question. Let me --
13 let's assume that I accept Mr. Hershey's construction of the
14 contract, has to be in the Custody wallet and approximately
15 \$15 million was reflected on the ledger but not in the
16 Custody wallet. How would that 15 million be treated if I
17 accept that it is -- I don't treat it as Custody?

18 MR. ORTIZ: I think it's a difficult question
19 which in some senses, Your Honor, to me demonstrates why it
20 should stay in Custody because again, if I look at the
21 simplest case, which I think is the -- what the Debtors
22 called in their motion the pure Custody, so you're sending
23 something over with a contract that says that it's going to
24 be a custodial relationship. It doesn't say, you know,
25 there's going to be four immediate steps and once it reaches

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1 this custodial wallet you have a relationship and in
2 between, we have a creditor-debtor relationship.

3 If that relationship is never formed, I guess --
4 you know, but to try to get around to the question you're
5 getting to and not do the lawyerly thing of answering it
6 differently, you know, if you were to rule that, which I
7 don't -- obviously don't think is the right ruling, but if
8 you were to rule that, then they probably have some sort of
9 --

10 THE COURT: Unsecured claim for breach --

11 MR. ORTIZ: -- relationship for a breach of
12 contract or a conversion or something of the sort,
13 particularly if --

14 THE COURT: There's -- I understand your -- I'm
15 not deciding this issue.

16 MR. ORTIZ: No, I understand that, Your Honor.

17 THE COURT: But would you agree that the amount
18 reflected in the ledger that was not reflected in the
19 Custody wallet would give rise to an unsecured claim for
20 breach of contract?

21 MR. ORTIZ: In the universe where we're
22 determining that that -- the contract doesn't go far enough
23 to give those people a Custody relationship, then yes, Your
24 Honor.

25 THE COURT: Okay. All right. Is there another

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1 point you want to make? I see your colleagues.

2 MR. ORTIZ: Yeah, no, I think the point he wanted
3 to make is, you know, this is kind of, depending on where we
4 end up today, if -- depending on where you come out on this
5 issue, it's somewhat interesting and I think the Committee
6 argued for pure Custody and for some other folks that the
7 solution is pro rata and I think we would have to
8 collectively, us, the Debtors, and the Committee, really
9 think through whether that's the right answer because if
10 it's specific people who have specific pending withdrawals,
11 that may be the bucket versus, you know, making a pro rata,
12 everybody shares that little bit.

13 But I don't -- you know, this all came to light,
14 you know, after we had a scheduling order, after we had
15 breached some things, so it's -- I think people are still
16 getting through what that means. But hopefully we never
17 have to reach that because we believe that it's all
18 custodial assets.

19 THE COURT: Just to be clear, I have not made up
20 my mind on any of this. But what -- if I were to agree with
21 the Committee's view, probably what I would do, would ask
22 that counsel meet and confer and see if they can reach an
23 agreement on what rules should apply, pro rata, lowest
24 intermediate value, just simply unsecured claim, and have
25 you try and resolve that. I'm not -- you know, I don't know

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1 where I'm coming out yet.

2 MR. ORTIZ: Understood, Your Honor, and I wouldn't
3 expect you to have come out on all these things with the
4 amount of papers you have in front of you. I think I'll
5 acknowledge --

6 THE COURT: And if I added the pile --

7 MR. ORTIZ: -- the attorneys --

8 THE COURT: -- yesterday, would be --

9 MR. ORTIZ: Right. Well, we have this view that
10 when we file something in ECF, it's just like magically in
11 your head and I will acknowledge --

12 THE COURT: I wish.

13 MR. ORTIZ: -- that that's not the case and that
14 the good folks sitting here and you have to do a lot of work
15 to actually get through that and we appreciate that.

16 THE COURT: Okay.

17 MR. ORTIZ: Thanks, Your Honor.

18 THE COURT: There was a hand raised on the screen
19 by Ms. Gallagher. I'll give you an opportunity to speak as
20 long as you're speaking to this issue of the Custody account
21 because that's the issue that the Court is dealing with. So
22 please, go ahead. I can see you on the screen.

23 MS. GALLAGHER: Yes, Your Honor. I think we're
24 missing an important point here with all the discussion of
25 the terms of service. We're not addressing the fact that

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1 Celsius did not hold a license to offer any Custody
2 services. So without that license, this whole category
3 cannot exist. And we have to look at why they formed this
4 category so hastily.

5 THE COURT: Ms. Gallagher --

6 MS. GALLAGHER: -- because the regulations --

7 THE COURT: May I ask you a question? May I ask
8 you a question? There clearly are states where they could
9 not offer Custody accounts, but there were many where they
10 could. So I don't know what the basis for your statement
11 that they didn't hold a license to have Custody accounts.
12 What are you pointing to?

13 MS. GALLAGHER: I -- well, Custody is a legal
14 thing, and so to be able to offer Custody, you have to have
15 the licenses for it.

16 THE COURT: Let me -- do you have some support --
17 Ms. Gallagher --

18 MS. GALLAGHER: Company was based in New Jersey --

19 THE COURT: Ms. Gallagher.

20 MS. GALLAGHER: Yes.

21 THE COURT: Do you have --

22 MS. GALLAGHER: Yes.

23 THE COURT: -- legal support for the statement
24 you're making? Because it seems contrary to everything that
25 I've read in the papers. That's why we have the Withhold

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1 issues, because those were people in states where Celsius
2 was not eligible to set up the Custody accounts. So they
3 have what were called to the Withhold accounts, but in the
4 vast bulk of the states, they were eligible and did have the
5 Custody program. So what is it that you're relying on to
6 say they had no authority to have Custody accounts?

7 MS. GALLAGHER: I'm relying on the examiner's
8 report where she made it clear that New Jersey had issued a
9 cease and desist order which was meant to come into effect
10 in December.

11 THE COURT: And she also makes clear -- she also
12 makes clear in the examiner's report that New Jersey kept
13 extending the deadline by which Celsius had to comply with
14 the cease and desist order. And it was the impending
15 exploration of that deadline that resulted in Celsius, in
16 effect, rushing the Custody program into effect. But the
17 New Jersey cease and desist order, as I understand it, dealt
18 with that they were not eligible to have Earn accounts for
19 unaccredited investors. Do you have some --

20 MS. GALLAGHER: That's --

21 THE COURT: I hear what you're saying, but I don't
22 know if you have support for your position, please let me
23 know specifically, not just your argument. Point to some
24 document. Is there something in a New Jersey cease and
25 desist order? Is there something else that you're relying

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1 on?

2 MS. GALLAGHER: Well, I can't put my hands on
3 anything at this very moment, but I think --

4 THE COURT: All right. What -- may I ask, Ms.
5 Gallagher, where do you -- Ms. Gallagher, what was your
6 account relationship with Celsius? An Earn account?

7 MS. GALLAGHER: My account is an Earn account. So
8 for my --

9 THE COURT: Where do you reside? Where do you
10 reside?

11 MS. GALLAGHER: I am British, but I reside in the
12 United States.

13 THE COURT: Where in the United States do you
14 reside?

15 MS. GALLAGHER: In Tennessee.

16 THE COURT: Okay. Last question. Whether you're
17 an accredited investor or not.

18 MS. GALLAGHER: I'm an unaccredited investor.

19 THE COURT: Okay. All right. I've heard you're
20 argument. Thank you very much, Ms. Gallagher. Is there
21 anybody else who wishes to be heard with respect to the
22 Custody accounts?

23 CLERK: Judge, there's two more raised hands.

24 There's a Kulpreet -- last name is K-H-A-N-U-J-A, and then
25 Eric Mendelson. We also have a Jeremy Höffing.

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1 THE COURT: All right. Let me hear -- what was --
2 spell the first one again, Deanna?

3 CLERK: Sure. The first name is Kulpreet, K-U-L-P-
4 R-E-E-T, last name is K-H-A-N-U-J-A.

5 THE COURT: All right. May I hear from you, Mr.
6 Khanuja.

7 MR. KHANUJA: Thank you, Your Honor. So Your
8 Honor, as you make the decision on the Custody, I want to
9 point out two things. One is essentially the distinction
10 between the pure Custody as well as against the transport
11 Custody. What I mean is there were people who would have
12 used the services and the subjective intent that the counsel
13 mentioned earlier with regards to safekeeping of their
14 assets. There -- I don't have the exact numbers but a very
15 small proportion of the number of the customers actually use
16 Celsius for pure Custody purposes, even beyond the April
17 terms of change uses and all.

18 Second, most of them, most of the customers were
19 grandfathered based on the, you know, the regulatory issues
20 you just mentioned or some other issues, grandfathered from
21 one account to another, essentially from Earn account into
22 Custody account. Why it's important, it's important because
23 some of the other users from other states do not get -- do
24 not get that kind of preferential treatment; whereas, the
25 account and the terms of service they signed up for

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1 essentially remains the same.

2 It's just like some -- based on the states they
3 decide on, they get to have a preferential treatment. And
4 secondly, we also know by the transaction analysis some of
5 our colleagues have done, many of the insiders also
6 transferred their assets from one account type like Earn
7 into Custody. So it's very important to make a distinction
8 between what purposes, whether it was a pure Custody or it
9 was grandfathered into Custody or transported into Custody
10 by insiders.

11 THE COURT: All right, thank you. Deanna, who was
12 the next person who wanted to speak? Because I can't see --
13 I can't identify them from my screen.

14 CLERK: No problem, Judge. It's Eric Mendelson.

15 THE COURT: All right. Mr. Mendelson?

16 MR. MENDELSON: Yes, good morning, Judge. Eric
17 Mendelson. I have most of my assets in the Custody account
18 as well as in the Earn account and I'm from the great
19 country of Florida. I just want to -- regarding the 6
20 percent, it sounds like that 6 percent may be or could
21 potentially be Custody holder that were trying to --
22 individuals that were trying to withdraw potentially from
23 the Earn account and because it wasn't -- because the
24 transaction wasn't executed, it went into the Custody
25 system.

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1 It sounds like Mr. Ortiz and I are aligned in that
2 those assets shouldn't be treated any different than the
3 Custody assets and that 6 percent should not be thrown in
4 the same bucket as Earn. Quite -- I hate using the term
5 preferential, but I would assume and I certainly don't have
6 case law here because I'm not a lawyer, but I assume that
7 being able -- a request of a withdrawal of assets probably
8 takes the most precedence in this case over any other asset
9 class or bucket.

10 And I just wanted to point that out, that if
11 individuals were trying to withdraw assets and because
12 Celsius claimed bankruptcy 12, 23 hours later, that they
13 shouldn't just be thrown back into Earn bucket for that
14 reason. Again, I'm not sure if that's where the 6 percent
15 comes from. It sounds like it could potentially be from
16 that. And I just wanted to draw your attention to that, and
17 I do appreciate your time.

18 THE COURT: Thank you very much, Mr. Mendelson.
19 Deanna, who was the next person?

20 CLERK: We have Jeremy Hoffing and then two
21 additional parties after that.

22 THE COURT: All right. Mr. Hoffing.

23 MR. HOFFING: Good morning, Your Honor. My name's
24 Jeremy Cohen Hoffing. I'm a unaccredited creditor in pure
25 Earn in the State of California. And the argument that I

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1 want to make is that I should not have been grandfathered in
2 to Earn. I think I should have been moved into Custody when
3 those accounts were established. It was clear in the
4 examiner's report that Custody was created to meet the
5 regulatory pressure from the State of New Jersey and a
6 couple other states.

7 And the creation of Custody was to meet those and
8 it's clear that there was no services offered in Custody
9 that anyone in Earn wouldn't want. Ninety percent of
10 customers were using Earn to receive rewards. And after the
11 creation of Custody, they continued to offer rewards in
12 Earn, incentivizing people to remain in that type of
13 account.

14 THE COURT: Yeah, I think the point, Mr. Hoffing,
15 is that account holders, whether they were in New Jersey or
16 anywhere else could elect to keep their assets, existing
17 assets in Earn accounts, but any additional deposits they
18 made of assets, if they were unaccredited investors, would
19 have to go into the Custody accounts.

20 MR. HOFFING: Right.

21 THE COURT: People were not forced -- there was no
22 requirement. There was no automatic transfer of existing
23 crypto assets from Earn accounts to Custody accounts.
24 People had to either elect to move their assets to Custody
25 or seek to deposit additional assets. Mr. Ortiz, do I have

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1 that correct? I guess I should ask Mr. Koenig but go ahead.

2 Go ahead. Mr. Ortiz, if you have an answer to that, go
3 ahead. What's your view?

4 MR. ORTIZ: Again, Your Honor, I was looking at my
5 notes and --

6 THE COURT: Okay. Mr. Koenig, go ahead.

7 MR. KOENIG: Your Honor, for the record -- Your
8 Honor, for the record, Chris Koenig. Your understanding is
9 correct. The existing unaccredited investors were
10 grandfathered in with respect to their existing assets.
11 They could not deposit new assets into Earn. That had to go
12 into --

13 THE COURT: There was no automatic transfer --

14 MR. KOENIG: Correct.

15 THE COURT: -- of assets from Earn to Custody.

16 MR. KOENIG: Correct, and the examiner's report
17 explains why, that it was consistent with a settlement that
18 was reached between the regulators in a different company
19 other than Celsius, and so Celsius' intent was to effectuate
20 that settlement, the same settlement that was entered into
21 with the regulators and that other company.

22 THE COURT: Okay. Thank you very much, Mr.
23 Koenig.

24 MR. KOENIG: Thank you.

25 THE COURT: All right.

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1 MR. ORTIZ: And Your Honor -- and now knowing the
2 question, yes, you had to actively move into Custody.

3 THE COURT: Pay attention now, Mr. Ortiz. I'm
4 sorry. I'm being -- I meant that as a joke.

5 MR. ORTIZ: Understood, Your Honor.

6 THE COURT: You're always very well prepared and
7 on point. Deanna, was there someone else who wanted to be
8 heard?

9 CLERK: Yes --

10 MR. HOFFING: I wasn't finished, but --

11 THE COURT: Yes, you have. Go ahead. Who's the
12 next person?

13 CLERK: So we have three more parties. The next
14 is Gilbert Castillo.

15 THE COURT: All right, Mr. Castillo --

16 MR. CASTILLO: Hello, Your Honor. Yes. Can you
17 hear me?

18 THE COURT: Yes, I can.

19 MR. CASTILLO: Great --

20 THE COURT: Go ahead.

21 MR. CASTILLO: Okay, great. I just wanted to
22 bring to light, we were talking about the pendings and the
23 terms of service. There's Section 11 of terms of service
24 called withdrawal and it says that subject the terms for any
25 of your eligible digital assets that you elect to utilize an

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1 Earn service, you have a call option on all loans made to
2 Celsius, demand immediate complete or partial repayment of
3 any loan at any time through transfer of Custody wallet
4 available to you, a complete, partial withdrawal of eligible
5 digital assets at any time. Such repayment will terminate
6 in whole, a part of your loan to Celsius and you no longer
7 accrue rewards.

8 So I would, just want to point out that when
9 someone made a pending withdrawal or withdrawal, they used
10 their call option to demand the repayment and I feel that
11 they are entitled to that money and should be considered as
12 Custody as well.

13 THE COURT: Well, they had to -- if I understand
14 Version 8 of the terms of use, after Version 8 came into
15 effect, withdrawals first had to go into the Custody wallet
16 and then from the Custody wallet to wherever the account
17 holder wanted it to go.

18 MR. CASTILLO: And --

19 THE COURT: That's a change from -- stop. That's
20 a change from what existed before the Custody wallet program
21 came into existence in April of 2022. But it had to be the
22 account holder who initiated the effort to withdraw assets,
23 in which case they moved first to the Custody wallet and
24 then to wherever the account holder wanted it to go. Mr.
25 Koenig, do I have that understanding correct?

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1 MR. KOENIG: Your Honor, for the record, Chris
2 Koenig. Your understanding is correct.

3 THE COURT: Okay. All right.

4 MR. CASTILLO: But I --

5 THE COURT: I don't -- Mr. Castillo, I'm not sure
6 I understand your point because it had to be the account
7 holder who initiated the transfer. We're not dealing with
8 deposit of new assets. We're dealing with an effort to
9 withdraw assets from Earn. To do that, you had -- it had to
10 be moved to Custody and then from Custody to wherever the
11 account holder wanted it to go. So --

12 MR. CASTILLO: Well, in my case it was -- that
13 function was bypassed because when I withdraw, when I made a
14 withdraw request I did a test function with a small amount
15 and it withdrew out of my account immediately. It doesn't -
16 - it didn't go from Earn to Custody. It just went Earn
17 straight to an external wallet. And when I did the larger
18 amount, it was just stopped at that point. So there was a -
19 - my --

20 THE COURT: Well, when you say you did the larger
21 amount, was it after the pause?

22 MR. CASTILLO: No. It was before the pause. I
23 did a transaction five minutes before of a small amount as a
24 test transaction and then five minutes later I did the
25 larger amount from my Earn directly to my external wallet,

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1 and it was frozen. Later when I printed the transaction
2 history on the CSV file that they sent to me on email, it
3 shows that the transaction was completed. And then just
4 recently maybe a month ago they changed that and now it's a
5 different, saying that it was not completed.

6 THE COURT: I mean that -- here's what I would
7 suggest, that you need to communicate with the Debtors'
8 counsel. I don't have any exhibits or paperwork. Your
9 situation is different than the sort of the general issues
10 that the Court is dealing with today. I'm not
11 underestimating the importance of this issue to you. At
12 least on the record today without documents in front of me,
13 I don't want to get into the amounts that you were trying to
14 transfer. Mr. Koenig, can you or one of your colleagues
15 reach out to Mr. Castillo and endeavor to see whether this
16 issue can be either crystallized or resolved or whatever? I
17 don't want to get into the specific amounts at this stage.

18 MR. KOENIG: Your Honor, Chris Koenig. We will
19 certainly do so. Mr. Castillo, we'll reach out to you but
20 if -- I don't know if we have your email address but my
21 email address is in the signature block of every Court
22 pleading that the Debtors file and likewise, we're just not
23 aware, your individual facts and circumstances but we're
24 happy to take it offline and to look into it with you.

25 THE COURT: Okay, so Mr. Castillo, reach out to

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1 Mr. Koenig and he'll either himself or have one of his
2 colleagues deal with you directly about it and we'll see
3 whether it can get resolved. Okay, Mr. Castillo?

4 MR. CASTILLO: Okay, thank you.

5 THE COURT: All right. Is -- Deanna, is there
6 anybody else who wants to be heard?

7 CLERK: Yes, two more part -- well, now three.

8 Cam Crews is next.

9 MR. CREWS: Hello, Your Honor.

10 THE COURT: Okay. Mr. Crews?

11 MR. CREWS: Yes.

12 THE COURT: Go ahead.

13 MR. CREWS: So I'm predominantly an Earn account
14 holder, although I have since become a Custody account
15 holder subsequent to the bankruptcy filing by transferring a
16 small amount of assets into my wallet. And just so we're
17 aware, that does not result in a transfer on the blockchain;
18 it's just a ledger in the sequel database that Celsius
19 maintains.

20 Two points. The 94 percent ration that's been
21 discussed, this rebalanced weeks after the pause date. If
22 you were to look, say, at the Ethereum Custody wallet, they
23 had only 65 percent of their obligations met. And I would
24 also urge Your Honor to reference Document 1515 which I
25 prepared. On Page 4, there's a diagram of deposits and

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1 withdrawals which I think can assist in seeing how on the
2 blockchain the payments transfer.

3 And then lastly, the point that Mr. Ortiz made
4 about Custody not requiring segregated wallets, I'd be very
5 interested in seeing that caselaw if it could be referenced,
6 the docket somewhere because in the context of blockchain,
7 that is very much not in keeping with the way people
8 perceive things. Thank you, Your Honor.

9 THE COURT: You know, Mr. Crews, I will -- ^have
10 to go back and read Judge Posner's decision, the Joliet-Will
11 case. I think that's the issue where there's a disagreement
12 between Mr. Ortiz and Mr. Hershey, in other words between
13 the Ad Hoc Committee of Custody Holders and the Unsecured
14 Creditors Committee. Mr. Hershey's argument is the terms of
15 use specifically define Custody account and it has to be
16 that, and not just an entry in a ledger that didn't make it
17 into the Custody account.

18 So the Court is going to have to resolve that
19 issue and I -- the Court will look at your -- you refer to
20 ECF 1515 and look at that before making any decision. Okay?
21 Thank you very much, Mr. Crews.

22 Deanna, who's next?

23 CLERK: We have Tony Vejseli -- my apologies if I
24 mispronounce your name.

25 MR. VEJSELI: Good morning --

1 THE COURT: Go ahead.

2 MR. VEJSELI: My name is Tony Vejseli. I am an
3 accredited investor. I have money in Earn, Custody. I have
4 an active learn -- an active loan, excuse me. I'm actually
5 in the Custody Ad Hoc Group. I'm going to be joining the
6 Loan Ad Hoc Group.

7 I just want to make a note. We already touched on
8 it a little bit, but in order to move your money from Earn
9 to Custody, it was like a three-step process. You have to
10 say that you know what you're doing and that you intend to
11 do it. Also, some people like myself, we ended up putting
12 more money into Celsius because they had a Custody solution.
13 I actually read the terms of service. I liked the part
14 where we hold the title. I ended up putting more money into
15 Custody where it was considered, I guess they're calling it
16 pure Custody now.

17 I had the opportunity, I had the ability to go
18 from Earn to Custody and I chose to stay in Custody. I
19 moved money from Earn to Custody. Didn't move it back to
20 Earn when I put it in. I think it's very important, you
21 know, that we keep this Custody solution or at least that we
22 honor the Custody contracts. A lot of people like myself,
23 we want a custodian. We want to make sure that Custody is
24 honored.

25 We want to make sure that we're not just throwing

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1 it away because clearly Celsius didn't know how to do it
2 correctly.

3 THE COURT: Well, let me ask. Mr. Koenig, the
4 relief that the Debtor was seeking in its separate motion
5 was to return to account holders if anything if Mr. Vejseli
6 deposited crypto into a Custody account, there's no issue
7 about who owns it. And the Debtors' motion is to return
8 that money to people like Mr. Vejseli, correct?

9 MR. KOENIG: Your Honor, Chris Koenig. That's
10 correct. And the reason is the preference claim has to
11 involve a transfer of the Debtors' interest and property --

12 THE COURT: And it never had an interest in the
13 property, it's not a preference.

14 MR. KOENIG: That's exactly right, Your Honor.

15 THE COURT: So the Debtor is seeking at least that
16 much of the relief that you're asking for, Mr. Vejseli, is
17 to return to account holders who deposited directly into
18 Custody --

19 MR. KOENIG: Pure Custody.

20 THE COURT: -- because you retain title to it,
21 assuming that -- I don't have the facts of your specific
22 case, but under the relief that the Debtor is seeking,
23 that's on the calendar as well, you would get that money
24 back. The issue is where funds were transferred from Earn
25 to Custody within 90 days of the bankruptcy petition, where

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1 there is this preference, avoidable preference issue.

2 MR. KOENIG: Right. And there, likewise Your
3 Honor, there's another wrinkle of the threshold in order to
4 be an avoidance preference --

5 THE COURT: Yes, it has to be above the 7,500 --

6 MR. KOENIG: Correct.

7 THE COURT: Okay.

8 MR. VEJSELI: If I may --

9 THE COURT: -- he's an accredited investor. It's
10 above 7,500, I --

11 MR. VEJSELI: Yeah. If I may, Your Honor, they're
12 also not looking to do that because I have an active loan
13 which is collateralized like to (audio drops).

14 THE COURT: We're not dealing with that today, Mr.
15 Vejseli. I can't -- okay. All right. Deanna, additional?

16 CLERK: All right, two more participants. Gregory
17 Kieser is next.

18 THE COURT: Okay. Mr. Kieser?

19 MR. KIESER: Hello, Your Honor. Can you hear me?

20 THE COURT: yes, I can. Go ahead.

21 MR. KIESER: My name is Greg Kieser and I'm a
22 creditor with primarily loans, but I have money in Earn now
23 and I'm primarily going to give a brief overview of loans
24 with respect to loans that were liquidated and those funds
25 were transferred into Earn when it is more than likely those

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1 -- that when they were liquidated, the excess collateral
2 should have gone into Custody. So I'm not sure you're
3 aware, but during -- after the pause, there were lots of
4 liquidations of loans based on having reached the -- an LTV
5 of 80 percent.

6 There's a whole group of us. I'm on a steering
7 committee representing hundreds of people who believe that
8 their loans were unfairly liquidated. That's another issue
9 to be addressed at a later time, but what I would like to
10 bring to your attention today is that much of the funds --
11 so when alone gets liquidated, the excess collateral has to
12 go somewhere and it got dumped into Earn. And I believe
13 that was inappropriate and there are hundreds of other
14 people who believe that was inappropriate. So I deposed
15 Oren Blonstein a couple of weeks ago and asked him about
16 this question in particular, and what he -- the point he
17 made was that -- I'm waiting. Is that a siren on your side?

18 THE COURT: It is. It's out on the street. Go
19 ahead.

20 MR. KIESER: Okay. Yeah, so the point he made was
21 that wherever the money came from to form the loan is where
22 the money would go after a liquidation event happened. But
23 the problem with that rationale is that in order to open a
24 loan, we had to transfer it into Earn, even if we had no
25 intention of going into an Earn account. So --

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1 THE COURT: Not after the Custody accounts were
2 set up. I don't think that's correct.

3 MR. KIESER: Yeah, I mean, that was a point that
4 Blonstein made is that -- and that's where my excess
5 collateral went and there's a whole other --

6 THE COURT: Mr. Kieser, let -- I'm only
7 interrupting because --

8 MR. KIESER: Sure.

9 THE COURT: -- that's not an issue that's going to
10 get resolved today.

11 MR. KIESER: Okay.

12 THE COURT: All right.

13 MR. KIESER: Yep. That's all I have. Thanks.

14 THE COURT: Thank you, Mr. Kieser. Deanna, who's
15 next?

16 CLERK: Michael Yankoski.

17 MR. YANKOSKI: Yes, good morning. Can you hear
18 me?

19 THE COURT: Okay. Yes, go ahead, Mr. Yankoski.

20 MR. YANKOSKI: Yes, hello, Judge. Good morning.
21 My name is Dr. Michael Yankoski. I am an unsecured pro se
22 creditor, and unaccredited creditor of Celsius. Thank you
23 for hearing me this morning. I wanted to bring to the
24 Court's attention and Judge, I believe you're already aware
25 of this, but the distinction between the Earn and Custody

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1 accounts was introduced by the Debtor in April of 2022, but
2 my understanding is that the distinction between Earn and
3 Custody was introduced within the 90 days of the Debtors
4 filing for bankruptcy.

5 And although you pointed out earlier in an earlier
6 statement this morning, Your Honor, that it was the option
7 of the customers to transfer assets from Earn to Custody,
8 the fact that -- the distinction between Earn and Custody
9 was introduced within 90 days of the filing of bankruptcy
10 means that anyone who chose to move from Earn to Custody is
11 subject to preference actions. So in a sense, although it
12 was the responsibility of the customer to do so, to transfer
13 between Earn and Custody, having done so by the structure of
14 the Debtors' distinction between the accounts, those
15 customers are subject or potentially subject to preference
16 actions and to clawbacks.

17 So I know you're already aware of that. I believe
18 you mentioned that at one of the hearings several weeks ago
19 and sort of pointed out to the Kirkland and Ellis counsel
20 how curious it was that the Earn and Custody distinction was
21 introduced within the 90-day period, but I just want to
22 bring it to your attention again today because there's
23 significant emphasis being put on the distinction between
24 Earn and Custody, but it seems to me as someone who moved
25 from Earn to Custody within the 90 days that I have

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1 significant concerns about the way that was structured and
2 the potential exposure to preference actions, even when I
3 was doing exactly what I was allowed to do as a client and
4 as a customer of Custody. Thank you, Your Honor.

5 THE COURT: Okay. I guess what I would respond
6 now, I'm keenly aware of the issues that you're raising. I
7 think everybody here is. So under the schedule, the
8 stipulated schedule, if we move to phase two, there are
9 provisions in the agreement about how all of this would
10 unfold before me, and so I think the -- there's the
11 opportunity for taking of depositions of some number of the
12 potential preference claimants.

13 The issue about preference is not entirely
14 straightforward. There are potential defenses that would
15 have to be addressed by the Court. That's not being done
16 today. But you're -- I'm keenly aware of everything you've
17 said and I have been for quite some time. You refer to
18 things that I've said before. I mean, it's -- yes, you
19 know, the 90-day look back period is in the statute and
20 there are consequences that flow from it.

21 This is not the first case where this kind of
22 issue has come up or something here, 89 days before. You
23 know, if it was 91 days, it would be an entirely different
24 situation. But we're at 89 days. I deal with the facts as
25 they are. So -- but I understand the point you raised, Mr.

1 Yankoski.

2 Deanna, is there anybody else?

3 CLERK: Yes.

4 MR. YANKOSKI: Thank you, Your Honor.

5 CLERK: Two more parties, John Bazolist is next.

6 My apologies if I mispronounce your name.

7 MR. BAZOLIST: You pronounced that correctly, and
8 I thank you for the time, Your Honor. I actually just
9 raised my hand based off that last question, just to add a
10 little bit of further clarification because there are some
11 edge cases. So me, for example, when I signed up for my
12 account, there was no previous Custody account at the time.
13 So for example, I signed up in March of 2022. I moved funds
14 over to take out a loan against my collateral, which means I
15 had to go into Earn because Earn was the only account at the
16 time.

17 In early June, I started to be a little bit
18 worried about the market, so I repaid my collateral and
19 moved my funds back from Earn to Custody. And so basically
20 what that means is my funds were never in Earn for more than
21 a fraction of a minute. But because of the way this account
22 was set up, I'm technically subject to a preferential claim
23 even though I was a net contributor to Celsius by interest
24 and never actually received interest from them. So it
25 sounds like you're aware of these issues but I just wanted

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1 to kind of paint the full picture for you there.

2 THE COURT: Yes, I'm aware of these issues. It
3 can get complicated, obviously, whether there are others in
4 precisely the same circumstance as you, I don't know. The
5 issues about the collateral and the loan program, I'm
6 certainly aware of. They're going to have to be resolved.
7 I'm trying as expeditiously as I can to be able to get
8 through these, to get through as many issues as soon as
9 possible. So I'm not aware of your particular factual
10 circumstances, but it's an example of issues that I was
11 aware of, okay.

12 MR. BAZOLIST: Yeah --

13 THE COURT: So it's not going to get -- it's not
14 going to get resolved with what I'm being asked to do now.
15 It isn't going to disappear. Okay.

16 MR. BAZOLIST: Right, and I'm firmly in a Custody
17 account now. It's just this whole concept of tainted funds
18 if you've ever touched the Earn program I think is what a
19 lot of people are having an issue with.

20 THE COURT: Sure. Okay. Thanks very much.

21 Deanna, who else do we have to hear from?

22 CLERK: Next is Rob Butryn; is that correct?

23 MR. BUTRYN: That's correct. Thank you, Your
24 Honor. I'm a accredited investor. I've been involved with
25 Celsius since 2019. I was mainly in the Earn Program, but I

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1 did move a lot of funds into -- actually transferred all my
2 funds almost off the account just before the freeze. Tried
3 to get the remaining out just before the freeze actually,
4 day before the freeze, and I was told I had to wait 48 hours
5 to establish a new wallet address for them which they knew
6 which wallet it came from. They just wanted to have that
7 time of reference for security. So in that timeframe, I
8 moved it to Custody.

9 Now, a previous person from the audience spoke
10 about the ledger system and how wallets are, you know, in
11 the cryptocurrency space looked at and, you know, I manage
12 many wallets. I'm the manager of several trusts with my
13 family, but this is a different instance, Your Honor, where
14 a company was holding our funds. The only wallet we were
15 aware of was the wallet we saw on our app or our screen. I
16 don't think we could look at a ledger system as far as where
17 the assets were held. We went by what we agreed with in the
18 terms of use when we said to move them. Thank you, Your
19 Honor.

20 THE COURT: Okay. Deanna, next?

21 CLERK: I don't see any additional raised hands,
22 Judge.

23 THE COURT: Okay. Is there any response from --
24 reply on this issue from counsel in the courtroom?

25 CLERK: Sorry, Judge. Simon Dixon just raised his

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1 hand.

2 THE COURT: All right, please go ahead.

3 MR. DIXON: Hi, Simon Dixon, creditor. Just
4 wanted to bring to the attention that the option for using
5 Custody wasn't available for any international clients. So
6 it was the only option available for U.S. customers. So we
7 were never presented with that option, just for the record.

8 THE COURT: Okay, thank you. All right, anybody
9 in the courtroom wish to reply? All right. Let's move on
10 to the Withhold.

11 MR. COLODNY: Your Honor, Aaron Colodny for the
12 Official Creditors Committee. I don't have a reply, but I
13 just wanted to clarify my previous comments.

14 THE COURT: Sure.

15 MR. COLODNY: If you look at Docket No. 1411,
16 which is the examiner's report, PDF Page 213 to 214, it has
17 the amounts in Custody wallets as of the petition date.

18 THE COURT: What does it show?

19 MR. COLODNY: It shows --

20 THE COURT: Somewhere I have the examiner's
21 report.

22 MR. COLODNY: So it shows --

23 THE COURT: Hold on a second. I really did --
24 which page?

25 MR. COLODNY: It's PDF Page 214. It's in the

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1 exhibits, Your Honor. Looks like --

2 THE COURT: Oh, I don't --

3 MR. COLODNY: -- short a copy.

4 THE COURT: Go ahead and tell me what it shows.

5 MR. COLODNY: So it shows \$182,934,763.78 -- and
6 that's U.S. dollars -- worth of assets in the Custody
7 wallets as of the petition date. The difference equals that
8 200 approximate number I gave you before.

9 THE COURT: Thanks very much, Mr. Colodny.

10 MR. COLODNY: Thank you.

11 THE COURT: I appreciate it. All right, let's
12 move on to Withhold, then. Ms. Kovsky.

13 MS. KOVSKY-APAP: Good morning, Your Honor. Deb
14 Kovsky, Troutman Pepper on behalf of the Withhold account
15 holders. If Your Honor will indulge me for a few minutes, I
16 think it's important to give a little bit of background and
17 context on the Withhold group members' position, how we got
18 here, and why legally we should be treated the same as
19 Custody.

20 Because Your Honor's asked this of the Custody
21 account holders, I will say that the size of the Withhold
22 accounts across the board, across all nine prohibited
23 states, not just the Withhold group, is actually smaller
24 than the entirety of the 6 percent of Custody assets that
25 are in question between the parties. I believe it's about

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1 \$15 million.

2 So how did we get here? As Your Honor previously
3 stated, once the Custody Program was launched by Celsius,
4 the Debtors changed the architecture of their platform. So
5 if you were a nonaccredited investor in the United States,
6 you could no longer transfer your digital assets from Earn
7 to an external wallet. You have to go first through a
8 default account.

9 From the default account, you could then initiate
10 a transfer to a whitelisted external wallet. In most
11 states, the default account was Custody. In the nine
12 prohibited states where the Debtors were not permitted
13 because they lacked the necessary licenses to Custody coins
14 on behalf of customers, it was the Withhold account which
15 basically served the same sort of central way station or
16 lobby function as the Custody accounts.

17 THE COURT: So let me ask you. There was no
18 withhold wallet; do you agree with that?

19 MS. KOVSKY-APAP: I do agree with that, Your
20 Honor.

21 THE COURT: So we're talking about ledger entries?

22 MS. KOVSKY-APAP: We are, Your Honor.

23 THE COURT: Okay.

24 MS. KOVSKY-APAP: And just like Mr. Ortiz and Mr.
25 Koenig, the Withhold Group believes that it's the ledger

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1 entries, it's the contractual relationship as reflected on
2 Celsius' ledger --

3 THE COURT: Well, when you say the contractual
4 relationship, you can educate me if I've got this wrong, but
5 this is what I've sort of struggled with, with respect to
6 Withhold. There is no -- there are no terms of use that
7 deal with what -- the Ad Hoc Group, the Withhold account
8 holders, the approximately \$15 million of people who are in
9 this broader category. Okay. That's correct, right?

10 MS. KOVSKY-APAP: That is correct, Your Honor.

11 THE COURT: Okay. So what I have puzzled about is
12 in the absence of a written contract dealing with hold --
13 with the Withhold issues, what's the construct, the contract
14 construct? How do I determine what are the rules? It is an
15 implied contract? Is it -- I don't even know that -- I
16 mean, there's no -- I can't, I don't have anything pointing
17 to -- there was an oral agreement that was reached.

18 There was -- they had this problem. When I say
19 they, the Debtors. They couldn't provide Custody accounts
20 to people in the nine states. So they created -- I'll call
21 it a fiction, but I mean it -- they had some intent when
22 they did it. There are ledger entries. How do I -- is it a
23 contract claim? What is it?

24 MS. KOVSKY-APAP: Well, Your Honor, I think it is
25 a contract claim, but I think we need to --

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1 THE COURT: What's the contract?

2 MS. KOVSKY-APAP: Well, we need to approach it
3 from the opposite direction. Remember, all of the assets
4 that belong to the Withhold Group -- and I'm speaking just
5 for my clients, not for the Withhold accounts as a whole --
6 but all of them had assets that were originally in the Earn
7 program and then left the Earn --

8 THE COURT: Well, they're not -- well, maybe your
9 group, but -- so there was a category of, I think there was
10 a category of Withhold before Custody was established. And
11 so if an account holder tried to deposit a species of crypto
12 that Celsius couldn't accept but the transfers happened
13 through blockchain and the stuff came to Celsius, okay, what
14 do they do with it? And that problem existed before the
15 Custody accounts were held, right? Am I right about that?

16 MS. KOVSKY-APAP: Yes, Your Honor, and in fact, I
17 think that's what the Debtors referred to as pure withhold
18 accounts, coins that either weren't eligible digital assets
19 or once the Custody program launched, coins that were coming
20 in newly deposited on the platform from customers in the
21 prohibited states. And the Debtors' position on those
22 coins, which we agree with, which I think even the Committee
23 doesn't dispute, is that the pure withhold assets are not
24 property of the estate, notwithstanding the fact that there
25 are no contractual terms. Nobody is disputing that the --

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1 nobody says that the lack of contractual terms around those
2 coins somehow makes them property of the estate.

3 THE COURT: You know, when --

4 MS. KOVSKY-APAP: So that's --

5 THE COURT: -- I took a bar exam, I took the New
6 York Bar in 1971, I think. Bailments were still covered on
7 the New York Bar exam in 1971. Fortunately, I don't
8 remember any questions on the exam, but you had to study it.
9 So -- but there's law about bailment. And I guess in the
10 absence of the written contract, I mean the law bailment may
11 still apply. I don't know whether it had to be in writing.

12 I mean, they received these coins. They weren't
13 eligible coins. I believe that the Debtors and the
14 Committee agree that title never transferred to the Debtor
15 of those coins. There's no issue about tracing because they
16 were coins that came in and couldn't be put into an Earn
17 Program, right?

18 MS. KOVSKY-APAP: That's my understanding, Your
19 Honor. Although as a practical matter, they went into the
20 aggregated main wallets and were used however they were
21 used, and yet notwithstanding that fact, the Debtors and the
22 Committee and the Withhold group all are in alignment that
23 those pure withhold assets, not property of the estate.

24 THE COURT: Okay. So what's the legal framework
25 that I -- so there's no contract terms you can -- no written

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1 contract terms you can point to. Is it that you're relying
2 on principles of constructive trust law? What is it that
3 you're -- in the absence of the written contractual terms
4 that you're relying on to establish the rights of each of
5 the respective parties?

6 MS. KOVSKY-APAP: Your Honor, let me separate this
7 because (audio drops) my clients --

8 THE COURT: I understand.

9 MS. KOVSKY-APAP: -- and I can only speak for my
10 clients. With respect to what we'll call the transferred
11 Withhold assets which the Debtors have put in the bucket of
12 in general, the Withhold assets, those are assets that were
13 transferred from the Earn Program. And why is that
14 meaningful? The Debtors and the Committee seem to be taking
15 the position or certainly the Committee is taking the
16 position that the default position is, if you transferred
17 assets onto the platform, then by default you must be
18 granting right and title to those assets --

19 THE COURT: This is where the Debtor -- they'll
20 correct me if I'm wrong. They sort of flip-flopped between
21 their opening position and their reply.

22 MS. KOVSKY-APAP: They did indeed, Your Honor, and
23 had I been doing --

24 THE COURT: Committee says no, no, no, no, no.

25 MS. KOVSKY-APAP: Had I been going in order with

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1 my presentation, I would have gone through and highlighted
2 how over and over and over again. And Your Honor, the whole
3 reason we're here today, how this all got started, the
4 Debtors filed their, what we've been calling their Custody
5 and Withhold motion, their motion to reopen withdrawals for
6 pure Custody assets and pure Withhold assets. And, great,
7 that's a great start.

8 It doesn't go far enough though, because the
9 transferred assets should really be released to the
10 customers as well. And so we ended up, you know, in this --
11 you know, that led to our motion for stay relief which led
12 to the scheduling order, which led to the phase one
13 briefing. But it all ties back to the Debtors' original
14 motion and if you go through that motion again and again,
15 they concede that the Withhold assets are not property of
16 the estate.

17 They're saying some of them may be subject to a
18 preference claim, but --

19 THE COURT: Well, this where they may have flip
20 flopped, okay?

21 MS. KOVSKY-APAP: They have indeed flip flopped
22 Your Honor.

23 THE COURT: Okay. Do you agree with respect to
24 your -- the withhold that you're -- not the pure Withhold,
25 the Withhold that you're talking about, title to the assets

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1 when in the Earn Program were with the Debtors?

2 MS. KOVSKY-APAP: I agree that that is what the
3 terms of use say that that's the contractual provision that
4 granted Celsius right and titled to the assets. Celsius
5 didn't magically acquire right and titled in a vacuum,
6 absent contractual terms.

7 THE COURT: No, but I guess the point is that when
8 your clients deposited crypto with the Debtors, title to the
9 crypto, those crypto assets because -- went into Earn
10 accounts, title passed to the Debtors. And then the issue
11 is, well, when they wanted to move out of the Earn accounts,
12 where did title go?

13 MS. KOVSKY-APAP: Exactly, Your Honor, and to
14 determine that --

15 THE COURT: that's what I -- where do I go to
16 determine that/

17 MS. KOVSKY-APAP: We go to Sections 4(d) and 13 of
18 the Terms of Use.

19 THE COURT: So let's go there and point that out
20 to me specifically.

21 MS. KOVSKY-APAP: All right. So Section 4(d), and
22 we have to --

23 THE COURT: Let me get to it. Okay.

24 MS. KOVSKY-APAP: Sure. And it's page --

25 THE COURT: I'm there.

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1 MS. KOVSKY-APAP: -- five -- okay. For the
2 record, 538 of 1126 pages in Docket No. 393.

3 THE COURT: Right.

4 MS. KOVSKY-APAP: And so what it says, if you go
5 to the bottom of the page. "If our Earn service is
6 available to you, upon your election, you will lend your
7 eligible digital assets to Celsius and grant Celsius all
8 rights and title to such digital assets for Celsius to use
9 in its sole discretion while using the Earn service."

10 That's a limitation on the contractual --

11 THE COURT: You're focusing on the last words,
12 while used in the Earn service. And when your clients say
13 move it and they're no longer in the Earn service, then we
14 have to ask the question, well, where'd title go.

15 MS. KOVSKY-APAP: Exactly, Your Honor. And if the
16 grant of title is by its expressed terms limited in time to
17 the period that they were using the Earn service, I think
18 that has to be the answer because they -- Celsius doesn't
19 acquire more than what the customers grant them. And the
20 same thing if you look at Section 13 of the terms of use,
21 consent to Celsius --

22 THE COURT: Let me switch --

23 MS. KOVSKY-APAP: Sure.

24 THE COURT: Go ahead.

25 MS. KOVSKY-APAP: Consent to --

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1 THE COURT: I'm on 554; are you on the same page?

2 MS. KOVSKY-APAP: Yes, Page 554 of 1126, still in
3 Docket No. 393. Section 13 says, "In consideration for the
4 rewards payable to you on the eligible digital assets using
5 the Earn service for us entering into any loan agreement" --
6 not really relevant here -- "and the use of our services,
7 you grant Celsius, subject to applicable law and for the
8 duration of the period during which you elect to utilize" --

9 THE COURT: Okay.

10 MS. KOVSKY-APAP: -- "the eligible digital assets
11 in the Earn service" -- et cetera, et cetera -- "all right
12 and title to such eligible digital assets." It specifically
13 says that you are only granting your consent for the
14 duration of this period.

15 THE COURT: So your argument is that while the
16 words of the term -- Version 8 of the terms of use do not
17 state what happens to title when the stuff is moved out of
18 Earn. You agree with me, they don't -- it doesn't
19 specifically -- there are no words in the Version 8 that
20 deal with the circumstance you're talking about. The people
21 elected, I want out of Earn, I'm no longer receiving
22 rewards, and you're saying that the language going back
23 earlier, the language only so long as it's in the Earn
24 Program, you're saying the negative implication of that is
25 title passes back to the Withhold people?

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1 MS. KOVSKY-APAP: Essentially, Your Honor. I
2 think it's a little bit more than a negative implication
3 because the grants of right and title in the first instance
4 was expressly limited and Celsius couldn't get more of a
5 grant of title than the customer granted to it. You know,
6 the Debtors said, oh well this is just a negative
7 implication, so we can just read it out of the contract.

8 THE COURT: But I'm not sure. I don't necessarily
9 agree with reading it out of the contract, but there are no
10 express words that say, that deal with title after it comes
11 out of the Earn. Right?

12 MS. KOVSKY-APAP: Your Honor, I disagree. I
13 believe that the grant of title being limited to the
14 duration of a specific period cannot extend beyond that
15 period. There's no express language in the contract saying
16 that by the way, once you're no longer using the Earn
17 service, despite the fact it says only for this duration,
18 Celsius will still get to retain right and title. There's
19 no express terms there and the question is really, who are
20 we going to be construing this contract against and who are
21 we construing it in favor of?

22 This is a contract of adhesion. This is a take it
23 or leave it clickwrap, you know, click a button contract
24 that could not be negotiated or modified by the customers,
25 and Celsius wants this contract to be construed in its favor

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1 to say, well, you know, maybe there's an ambiguity here that
2 it doesn't say expressly that right and titled reverts. It
3 does say expressly right and title is granted for this
4 duration --

5 THE COURT: Right.

6 MS. KOVSKY-APAP: But Judge, construe this in
7 favor of Celsius and allow Celsius to retain right and title
8 beyond the express terms of the grant? That is absolutely
9 contract to black letter law --

10 THE COURT: That is --

11 MS. KOVSKY-APAP: I'm sorry, absolutely contrary
12 to black letter law. A contract --

13 THE COURT: Just humor me. Point me to the black
14 letter law that you say it's contrary to.

15 MS. KOVSKY-APAP: Give me one second, Your Honor.

16 THE COURT: Fine. I have your brief here,
17 somewhere.

18 MS. KOVSKY-APAP: It is in our brief.

19 THE COURT: Yeah, I'm sure it is. So --

20 MS. KOVSKY-APAP: I should have marked the page.

21 THE COURT: Is this your phase one response brief
22 or the earlier?

23 MS. KOVSKY-APAP: I believe it was in our response
24 brief.

25 THE COURT: Okay. I've got that right in front of

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1 me.

2 MS. KOVSKY-APAP: So, we've got Westchester Resco

3 --

4 THE COURT: Tell me the page.

5 MS. KOVSKY-APAP: Page 9 of 24.

6 THE COURT: Okay.

7 MS. KOVSKY-APAP: Paragraph 7.

8 THE COURT: I must have the wrong briefing.

9 MS. KOVSKY-APAP: It's Docket 1573.

10 THE COURT: Hang on. See if I have -- okay, I'm
11 at Page 9. Which paragraph?

12 MS. KOVSKY-APAP: Paragraph 7.

13 THE COURT: Okay, go ahead. I have it in front of
14 me. That wasn't the same ECF docket number you gave me.

15 MS. KOVSKY-APAP: The docket number at the top of
16 my page is 1573.

17 THE COURT: Okay. It is. Go ahead. I've got it
18 -- have it on paper and I have it open on the screen. Just
19 -- forgive me.

20 MS. KOVSKY-APAP: Not a problem at all, Your
21 Honor, and --

22 THE COURT: Paragraph 7 on Page 5.

23 MS. KOVSKY-APAP: I have -- I'm sorry, Page 5 of
24 the document, page 9 of 24 of the PDF. And in answer to
25 your question, the -- some of the cases that set forth the

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1 fairly uncontroversial principle that contracts get
2 construed against the drafter, we have Westchester Resco Co
3 LP v. New England Reinsurance Corp, 818 F.2d 2, and that's
4 second -- .

5 THE COURT: I have -- now I've got the cites open
6 in front of me. So you're relying on these, the cases that
7 you've cited in Paragraph 7 of this briefing?

8 MS. KOVSKY-APAP: Correct, Your Honor, and this is
9 just a representative sampling --

10 THE COURT: Sure.

11 MS. KOVSKY-APAP: -- of cases. It's a fairly, as
12 I said, I think a fairly noncontroversial principle,
13 although in application here, there seems to be quite a lot
14 of disagreement between the parties and Celsius and the
15 Committee seem to be advocating for a construction of the
16 Earnings terms of use in a way that is materially detrimental to
17 the customers and in favor of Celsius.

18 THE COURT: Okay.

19 MS. KOVSKY-APAP: So -- I'm sorry --

20 THE COURT: You're just -- but I guess the point
21 is, the legal principle that you're relying on in support of
22 your argument is that ambiguity should be construed against
23 Celsius.

24 MS. KOVSKY-APAP: Our first point is that we think
25 it's not ambiguous, that it's clear that the term of the

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1 grant was time limited but in the event the Court does find
2 that there is an ambiguity there, it must be construed
3 against Celsius and in favor of the customers.

4 THE COURT: It was -- the specific grant appears
5 to be time limited, but where it went after the time expired
6 is not stated clearly.

7 MS. KOVSKY-APAP: That's correct. It could have
8 gone anywhere. It could have gone to another service where
9 the customers regranted title to Celsius.

10 THE COURT: Right. I just want to be sure I've
11 got your -- okay.

12 MS. KOVSKY-APAP: Yes. All right. So have I
13 fully answered Your Honor's question --

14 THE COURT: You did.

15 MS. KOVSKY-APAP: -- about the contractual --

16 THE COURT: Absolutely.

17 MS. KOVSKY-APAP: All right.

18 THE COURT: I don't know if I agree, but -- I
19 haven't decided one way or the other, but I understand your
20 point.

21 MS. KOVSKY-APAP: Understood, Your Honor. Thank
22 you. Then with respect to, so where did they go, they went
23 to his no man's land, this holding place that the Debtors
24 have called Withhold. It's a separate account on the
25 system. It's separately tracked --

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1 THE COURT: Separate --

2 MS. KOVSKY-APAP: -- the ledger.

3 THE COURT: -- the ledger. It was transferred on
4 the ledger.

5 MS. KOVSKY-APAP: Yes, it was, Your Honor.

6 THE COURT: Transferred from Earn to -- did they
7 call it Withhold on the ledger?

8 MS. KOVSKY-APAP: I don't know if they called it
9 Withhold on the ledger. It certainly appeared that way in
10 the app.

11 THE COURT: Withhold?

12 MS. KOVSKY-APAP: Withhold.

13 THE COURT: Okay.

14 MS. KOVSKY-APAP: And I know that the Debtors have
15 variously called it withheld or withhold, but it appears as
16 Withhold account --

17 THE COURT: Okay.

18 MS. KOVSKY-APAP: -- if you go on your phone, and
19 --

20 THE COURT: Sure.

21 MS. KOVSKY-APAP: -- go into the app. So I guess
22 part of the question is, how do we treat this no man's land
23 of Withhold. And one of the things I think we need to look
24 to is what's the Debtors' stated intent. How did the Debtor
25 think about this Withhold account that it created and that

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1 as I said, how we got here, why we're in Court today, it all
2 started with the Debtors' initial Custody and Withhold
3 motion. And that's inextricably tied to the issues of
4 ownership that we're discussing here. So I'd like to --

5 THE COURT: But you would agree, I take it, if
6 ownership transferred back to your clients, then we got to
7 deal with the preference issues.

8 MS. KOVSKY-APAP: Yes, Your Honor. I do agree,
9 and in fact, that's -- it's a little bit of an odd position
10 that the Debtors are taking now because they were so clear
11 in their Custody and Withhold motion that look, none of
12 these are property of the estate, but if they transferred --

13 THE COURT: I'm not sure it was quite as clear as
14 you just said. They -- I don't have the brief, the first
15 briefs. I sort of remember when this issue came up in
16 Court. They acknowledged that could be the result, but I'm
17 not sure that they committed -- I don't think there was a
18 concession that they could be bound to. What -- go ahead.

19 MS. KOVSKY-APAP: Well, if you look at Paragraph
20 30 of their Custody and Withhold motion, and if we treat
21 these as judicial admissions as I think they are, the Debtor
22 said that the Withhold assets, which by the way they define,
23 they expressly define in their motion that the transferred
24 Withhold assets are included in this defined term Withhold
25 assets.

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1 And what they say at Paragraph 30 is with respect
2 to the Withhold assets, the Debtors have never claimed or
3 acquired an equitable interest in the cryptocurrency stored
4 in Withhold accounts. Thus Custody and Withhold assets are
5 held by the Debtors on behalf of customers and are not
6 property of the Debtors' estate.

7 But I think even more meaningfully specifically,
8 with respect to the transferred Withhold assets, the
9 argument that they're making that they have -- and they've
10 said this flat out -- we have a *prima facie* claim for a
11 preference against these assets. Why? Because they said
12 that each transfer from the Earn Program to a Withhold
13 account was -- and I'm going to quote them here -- "made to
14 or for the benefit of a creditor on account of an antecedent
15 debt, i.e., extinguishing the Debtors' contractual
16 obligations to return the cryptocurrency to the customers" -
17 -

18 THE COURT: That was before they changed their
19 position in --

20 MS. KOVSKY-APAP: -- "pursuant to the latest terms
21 of use." Yes, that was before they changed their position,
22 but this is -- they admitted their intent at this point and
23 they're still claiming that they have a *prima facie* case for
24 a preference. Your Honor, if there was no transfer --

25 THE COURT: Only -- no. They only have a *prima*

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1 facie case for preference if title was transferred back to
2 your clients.

3 MS. KOVSKY-APAP: And they have asserted that they
4 do. I'm not saying -- I'm not saying that Your Honor has to
5 accept their assertion. I'm saying that if we want to
6 understand what the Debtors' intent was with respect to
7 these Withhold accounts, there's no better evidence to look
8 to than their own statement. You know, if the transfer from
9 Earn to Withhold extinguished their contractual obligation
10 to return assets, that's about as clear a statement of
11 intent as you can get.

12 THE COURT: Then it throws us (audio drops)
13 problem of tracing.

14 MS. KOVSKY-APAP: It does, problem of tracing.
15 And in that regard, I have to say I agree wholeheartedly
16 with all of the arguments that Mr. Ortiz was making with
17 respect to the Custody accounts. I think he's absolutely
18 correct. It doesn't -- what happens on the blockchain,
19 where the assets happened to be stored is not the relevant
20 question here. The relevant question is, what's the
21 contractual relationship? What was reflected on the ledger?
22 What did the parties agree to? What was their intent?

23 THE COURT: Well, if they disregarded the contract
24 and put the assets into an aggregated wallet, that included
25 everybody else's crypto or lots of other people's crypto,

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1 then you're faced with the issue of how do I determine which
2 of that -- what's in that aggregated wallet really is mine,
3 and if there's a shortfall, how is it allocated?

4 MS. KOVSKY-APAP: Well, here's the thing, Your
5 Honor. If you look at all of the assets that were held on
6 the Debtors' platform, with the exception of a couple of
7 minor coins that are not at issue for any members of my
8 group, there was no shortfall. If you look at all of the
9 assets across the platform that Celsius held with respect to
10 the Custody assets, there was no shortfall. The coins are
11 there and the Committee has made the point, oh well,
12 Withhold is asking for special treatment. You know, they
13 think just because they sued first, they should get to the
14 front of the line.

15 That is absolutely not the case, Your Honor. The
16 issue is that contractually, legally according to the terms
17 of use, title reverted from Celsius back to the owners.

18 THE COURT: Let's assume I come out the way you
19 just said. Where were those -- on their ledger? Well,
20 first, in wallet, where were the coins held?

21 MS. KOVSKY-APAP: Based on Oren Bronstein's
22 declaration, coins that were associated with the Withhold
23 accounts were held in main aggregator wallets.

24 THE COURT: Okay. And what about on the ledger?
25 Where -- what's reflected on the ledger about who owned the

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1 assets in the aggregated wallet?

2 MS. KOVSKY-APAP: Your Honor, I don't think the
3 ledger speaks to ownership interests.

4 THE COURT: Well, is there any designation in the
5 ledger for the aggregated -- I assume there's a ledger for
6 it?

7 MS. KOVSKY-APAP: I believe it's -- and I will
8 defer to Debtors' counsel if I get this wrong. My
9 understanding is there's one big ledger that tracks
10 everything and it will show what coins are allocated to
11 borrow, what coins are allocated to Earn, what coins are
12 allocated to Withhold, to Custody. And it's all one big
13 database.

14 THE COURT: Okay.

15 MS. KOVSKY-APAP: At least that is my very
16 layman's lawyer understanding.

17 THE COURT: So you believe that -- and I don't
18 know if I have an exhibit that shows this -- that there's an
19 accurate accounting in Celsius' ledger about what crypto
20 coins of various species or types are Celsius' property,
21 which are Withhold, which are Custody?

22 MS. KOVSKY-APAP: Well, again, I don't know that
23 the ledger speaks to who owns what property, but I do
24 believe there's a -- I have no reason to question the
25 accuracy of the ledger when it says there's this many coins

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1 associated with Custody, this many coins associated with
2 hold, this many with Earn. I'm basing that in part on the
3 fact that I know customers -- and this is attached to -- in
4 declarations attached to our initial filing -- they're able
5 to download CSV files to show their transaction history. My
6 understanding is that those came directly from Celsius'
7 ledger and they appear to be accurate.

8 THE COURT: Okay. All right.

9 MS. KOVSKY-APAP: One point that I think is
10 important to clarify, so the Debtors and the Committee spent
11 a lot of time focusing in their response briefs on
12 distinguishing between the Custody assets, which everybody
13 agrees -- including the Withhold Group by the way -- and
14 notwithstanding comments we made in our response brief, I
15 don't want to give the impression that we believe Custody
16 assets are property of the estate. We believe they belong
17 to the customers.

18 But the Debtors and the Committee spent a lot of
19 time trying to distinguish those assets from the Withhold
20 assets. For example, they spent a lot of time focusing on
21 the fact that the Withhold assets were commingled in main
22 wallets, the concern that Your Honor just raised, and those
23 could be deployed across the platform.

24 Well, so are the Custody assets. The examiner's
25 report makes it clear that when Custody assets were

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1 deposited into what a customer thought was a Custody
2 account, that was a ledger entry. It popped up immediately
3 on the ledger. It was in the app. But the assets
4 themselves went into the main aggregator wallets. They were
5 commingled. They could have been deployed by Celsius. They
6 might have been taken off of the platform altogether by the
7 customer before there was ever any true-up by Celsius of the
8 amounts in the Custody wallet.

9 And if a depositor transferred from Earn into the
10 Custody account, again, nothing happened on the blockchain.
11 It was a ledger entry. The assets stayed right where they
12 were in the main aggregator wallet and at some point, maybe
13 days later, Celsius would transfer some of the commingled
14 assets from the main wallet to the Custody wallet to try to
15 backstop the Custody assets, but those weren't Custody
16 customers' assets.

17 They were commingled from the main wallet. They
18 could have come from anyone. They could have come from
19 members of the Withhold Group. And as I said, because of
20 the timing and the delays in true-ups, a Custody customer
21 could transfer from Earn to Custody to an external wallet
22 all before Celsius even performed a single reconciliation or
23 true-up. So if having assets --

24 THE COURT: That's the problem, isn't it?

25 MS. KOVSKY-APAP: Well, here's the thing, though.

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1 Everybody agrees though, that Custody assets belong to
2 Custody. And if having assets in the comingled main wallets
3 don't make Custody assets property of the estate, that
4 shouldn't make Withhold assets property of the estate
5 either. Another thing that the Committee points out is that
6 when a customer transferred assets from Earn to Withhold, no
7 coins immediately moved from one wallet to another. It was
8 a block -- it was, nothing happened on the blockchain. It
9 was just a ledger entry.

10 Okay, well, you know, what was true of Withhold is
11 true of Custody as well. The fact that Custody customers
12 were able to move their assets from one legal status under
13 Earn to a different legal status under Custody by pushing a
14 button and making a ledger entry without any movement on the
15 blockchain, if they could do that, then Withhold could do
16 that, too.

17 All right. So then the Committee says, well, the
18 Withhold account holders were only entitled to get back the
19 same type and amount of assets they deposited, not the
20 actual coins. It wasn't 100 percent clear to me, but that
21 appeared to be an argument against Withhold assets belonging
22 to the Withhold customers.

23 THE COURT: That was true for all customers,
24 period.

25 MS. KOVSKY-APAP: Exactly. That was true for all

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1 customers. So that's not a valid reason to --

2 THE COURT: Earn account holders, they're -- they
3 just had to get in-kind. If they wanted to withdraw, they
4 got in-kind distributions of Bitcoin or whatever that that
5 they deposited.

6 MS. KOVSKY-APAP: Exactly. The same with Custody.
7 The same as with Withhold. So that fact doesn't argue in
8 favor of Custody being property of the estate, but not
9 Withhold or -- I said that backwards. That doesn't mean
10 that Custody is not property of the estate but Withhold is.
11 That was the point I was trying to make.

12 If customers wanted to withdraw assets to an
13 external wallet, a Custody customer hits the button to do a
14 transfer to an external wallet. Nothing comes out of the
15 Custody wallet. The examiner's report, the Blonstein
16 declaration make it clear that those withdrawals came out of
17 a frictional wallet that was pulling from the aggregated
18 main wallet, same as Withhold.

19 Well, if it was good enough for Custody and
20 Custody is not property of the estate, the same should be
21 true of Withhold. At the end of the day, the only real
22 difference between Custody and Withhold is that the Debtors
23 did make a somewhat sloppy, somewhat imperfect attempt to
24 maintain a liquidity reserve to backstop Custody.

25 THE COURT: When I look at the universe of Earn,

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1 Custody, Withhold, do you agree there is a shortfall for at
2 least some of the coins that were supposedly being held by
3 Celsius?

4 MS. KOVSKY-APAP: I agree that if you look at
5 everything solely in the aggregate without making any
6 distinctions between coins that are still on loan to Celsius
7 and subject to a grant of right and title versus coins that
8 have legally already been returned to the customers, then
9 yes, that's a true statement.

10 THE COURT: All right. And how's -- if I accept
11 your argument, how does the Court order relief recognizing
12 that there -- there isn't a shortfall in every category of
13 crypto. There are -- there is a shortfall in some, right?

14 MS. KOVSKY-APAP: Your Honor, I haven't looked at
15 the shortfalls across the board. I've only looked at the
16 Withhold assets and there are, I believe, five coins with
17 respect to which there is a shortfall with respect --

18 THE COURT: How does the Court -- let's just deal
19 with that, okay, so you say five coins is a shortfall. How
20 is the Court in your view supposed to deal with awarding
21 relief where there is a shortfall in five of the species of
22 coins?

23 MS. KOVSKY-APAP: Well, every Withhold account
24 customer knows and Celsius knows exactly what coins they
25 held and in what amounts. As long as the balance of those

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1 coins never fell below what those customers are owed, they
2 should be able to recover them, so --

3 THE COURT: To the disadvantage of Earn account
4 holders.

5 MS. KOVSKY-APAP: It's not a disadvantage --

6 THE COURT: It is.

7 MS. KOVSKY-APAP: -- Your Honor.

8 THE COURT: Every coin, every piece, you know --
9 call them dollars. It's just easier for me to do that.
10 Every dollar paid back to Withhold that's coming out of an
11 aggregated wallet is that much less available for pro rata
12 distribution to unsecured creditors; yes or no?

13 MS. KOVSKY-APAP: Can I give the yes but lawyer
14 answer? Yes --

15 THE COURT: Yes, then you can go ahead and explain
16 your answer. Go head.

17 MS. KOVSKY-APAP: Okay. I would say --

18 THE COURT: I'm not trying to -- I'm not trying to
19 trick you. I just --

20 MS. KOVSKY-APAP: Yes, but as Your Honor has
21 stated at a number of other hearings, that is the
22 unfortunate result that happens when legally some of those
23 coins are property of the estate and some of them are not.

24 THE COURT: Well, but the law has developed a
25 variety of ways of allocating a shortfall. And the ways of

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1 allocating the shortfall is not to give your clients 100
2 percent and diminish what unsecured creditors recover. It
3 doesn't mean you don't get anything but there's a short --
4 and it may be on a coin-by-coin basis. You say there's only
5 five. I'll accept that for present purposes.

6 MS. KOVSKY-APAP: And Your Honor, that comes from
7 the stipulation that we --

8 THE COURT: Yeah, that's fine. I read -- I reread
9 the stipulations this morning. If I accept your position
10 that title transferred back to your clients and there was no
11 separate wallets that the coins went into, they were in an
12 aggregated wallet, and for certain for five of the types of
13 coins, there's not enough to go around; that means
14 allocating a shortfall. And you're -- you seem to be taking
15 the view of we get everything, they suffer the loss. Why is
16 that?

17 MS. KOVSKY-APAP: Your Honor, I'm not saying we
18 get everything and they suffer the loss. And certainly just
19 to clarify, with respect to the five shortfall coins, none
20 of them, none of my clients are owed or own any of those
21 coins in their Withhold accounts.

22 THE COURT: Okay, but --

23 MS. KOVSKY-APAP: Put those to the side.

24 THE COURT: You're asking me to decide issues.

25 You've got an Ad Hoc Committee. There are specific members

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1 of it, but there are others who aren't part of the Ad Hoc
2 Committee.

3 MS. KOVSKY-APAP: Correct.

4 THE COURT: And I'm trying to come up with, okay,
5 here's the -- you know, it may be that if your clients
6 aren't faced with the shortfall, the issue of allocating the
7 shortfall, good for them, you know, assuming I find for you
8 on the other issues. But there are people who would have
9 the coins for which there is a shortfall.

10 MS. KOVSKY-APAP: Right. So if we're looking at
11 all of the Withhold account holders as a group and we're
12 looking at the shortfall to satisfy their ownership rights
13 in their assets, yes, there is a shortfall as to specific
14 coins, but then we go to the lowest intermediate balance
15 test and that's the unfortunate fact. If you own assets,
16 they're not property of the estate, they're still in the
17 Debtors' possession, the Debtor has wrongfully commingled
18 them, and there's not enough of a particular type of asset
19 to satisfy what you own, then you're not going to get it.
20 so if --

21 THE COURT: And I can say, the only -- in the last
22 16 years, I think I've only had one case where this was the
23 issue, was an issue. And you know, the parties argued
24 Colorado law applied in the case and what their way of
25 allocating shortfall. I got law in different states and

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1 mercifully the parties resolved the issue by agreement and
2 there was a 1919 and it got approved. But otherwise, I
3 would have ultimately had to -- I had bench memos analyzing
4 the different ways of allocating the loss. I didn't
5 actually have to decide it. I thought I might have. I went
6 back to look at the cases. I didn't have to decide. The
7 party's resolved it.

8 So -- but you're again, you say not your clients
9 and I'll ask the Committee and the Debtor how many potential
10 Withhold account holders deposited coins for which there's a
11 shortfall and for which some rules on allocation would have
12 to be made. You say that doesn't involve your specific
13 clients on the Ad Hoc Committee, right?

14 MS. KOVSKY-APAP: Right. So unfortunately I
15 didn't delve further into --

16 THE COURT: That's okay.

17 MS. KOVSKY-APAP: -- to investigate what the
18 numbers would look like or consider how it would be
19 allocated. But yes. So if we're talking about a shortfall
20 within the, all of the interests of the Withhold account
21 holders across the board, there are five types of coins
22 where there would have to be some type of allocation made.
23 With respect to the vast majority, the vast majority of
24 assets, for all Withhold account holders, there are more
25 than ample assets available on the platform to satisfy all

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1 of them in full, because the entire --

2 THE COURT: We'll see whether Mr. Koenig and Mr.
3 Hershey agree with you or not on that point, but that's --

4 MS. KOVSKY-APAP: Well, I mean, the entirety of
5 all of the Withhold accounts, as I said before, across all
6 nine prohibited states, it's a de minimis amount compared to
7 the totality of the assets on Celsius' platform. And just
8 to close the loop on Your Honor's question, you know --
9 about doesn't this, you know, reduce dollar-for-dollar or I
10 guess coin-for-coin, the distributions available to Earn
11 account holders or other account holders. Well, of course
12 it does, but that is the consequence of these not being
13 property of the estate.

14 THE COURT: Well, it's not a consequence that it's
15 a dollar-for-dollar diminution if the shortfall has to be
16 allocated. You know, some rules for how you determine how
17 that shortfall is resolved. Somebody will educate me about
18 this, but my recollection is it doesn't mean you get
19 everything and they get nothing.

20 MS. KOVSKY-APAP: Well, we're not suggesting that
21 the Earn account holders get nothing. We're suggesting that
22 out of the billions of dollars of cryptocurrency assets on
23 Celsius' platform, there's about 15 million in that
24 aggregated bucket of assets that don't belong to the estate.

25 THE COURT: And I guess the point is, if it's

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1 commingled, you don't get the -- the Withhold as an entire
2 group don't -- doesn't get the 15 million and the unsecured
3 creditors suffer the consequences of that. You get all,
4 they get nothing of that 15 million.

5 MS. KOVSKY-APAP: Well, that --

6 THE COURT: That's not my understanding of the
7 law. You think it is?

8 MS. KOVSKY-APAP: Your Honor, I -- my
9 understanding of the law is that if there's a constructive
10 trust around --

11 THE COURT: You have -- wait, wait, wait -- you've
12 now jumped to a constructive trust?

13 MS. KOVSKY-APAP: Your Honor, we argued it at
14 length --

15 THE COURT: I know you did in your brief. But
16 that's not the argument you made to me today. You argued
17 plain meaning of the contract, even though it's silence
18 about what happens to title. You said the negative
19 implication of title, you know, they only had title for as
20 long as it was in an Earn account. You didn't argue -- it's
21 in your brief, no question about it.

22 MS. KOVSKY-APAP: Well, Your Honor, we get -- we
23 only get to constructive trust -- and perhaps I should have
24 laid this out more chronologically. I was trying to jump in
25 and answer your questions as they came up. But we get to

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1 the constructive trust because these contractually were
2 returned to the ownership of the Withhold account holders.

3 THE COURT: Just let me -- constructive trust or
4 otherwise, your position is the Withhold account holders for
5 -- with coins for which there is a shortfall, they get
6 everything. The unsecured creditors get -- take the hit
7 completely. That's your position?

8 MS. KOVSKY-APAP: Our position is --

9 THE COURT: Yes or no?

10 MS. KOVSKY-APAP: Yes, Your Honor. That is our
11 position.

12 THE COURT: You got -- give me a case that says
13 that.

14 MS. KOVSKY-APAP: You'll give me just a moment,
15 Your Honor.

16 THE COURT: Constructive trusts are disfavored in
17 bankruptcy, precisely for the reason that recognizing the
18 constructive trust and giving the beneficiaries of a
19 constructive trust 100 percent results in a diminution in
20 the recovery of unsecured creditors. That's one of the
21 reasons there's such a strong bias against -- I won't say
22 never, but that's why Courts are very reluctant to impose a
23 constructive trust that gives everything to the
24 beneficiaries of this constructive trust and takes it
25 dollar-for-dollar away from the unsecured creditors.

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1 So tell me what case you're relying on -- cases.

2 MS. KOVSKY-APAP: So if you go to our initial
3 brief with -- which is Docket 1289.

4 THE COURT: Yes. I've got that in front of me.

5 MS. KOVSKY-APAP: We discussed constructive trust
6 at Page 15 of the brief. It's Page 20 out of 31 of the PDF.

7 THE COURT: Okay, I'm at 15. Yes. What's the
8 case that you're --

9 MS. KOVSKY-APAP: So one of the cases that we're
10 relying on is *In re Edison Brothers*, 243 B.R. 231. It's a
11 Delaware bankruptcy court case from 2000 in which the Court
12 stated, "Courts have concluded that property which a Debtor
13 holds in trust, express or constructive, for another does
14 not become property of the estate when the Debtor files for
15 bankruptcy."

16 You also have *In re Columbia Gas Systems Inc.*, 997
17 F.2d 1039 (3d Cir. 1993). Congress clearly intended the
18 exclusion created by Section 541(d) to include not only
19 funds held in express trust, but also funds held in
20 constructive trust.

21 THE COURT: But I would have to find that you
22 satisfy each and every requirement for there to be a
23 constructive trust. You didn't -- with your contract
24 argument, you didn't rely on that, but you're making a
25 separate argument that if I don't find that the express

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1 contract deals with this, then you rely on a constructive
2 trust and you believe you satisfy each and every element
3 required to establish a constructive trust. Is that your
4 position?

5 MS. KOVSKY-APAP: Your Honor, let me back up and
6 take those things --

7 THE COURT: Are you able to answer that?

8 MS. KOVSKY-APAP: I am able to answer that, but I
9 think I need to back up for a minute because I think we may
10 be talking past each other and conflating two separate
11 issues. We are not saying -- my argument is not that there
12 is an express contract, therefore it's our property or
13 there's an express trust, therefore it's our property.

14 What I'm saying is there's an express contract.
15 Property rights were returned to the customers, to the
16 account holders, because their grant of right and title
17 terminated. Now what happened then, Celsius misused those
18 customer funds, the customers' property. Celsius commingled
19 the funds. Celsius may -- who knows what Celsius may have
20 done with them.

21 But that -- there was a misuse of customer
22 property as is unfortunately all too common in the crypto
23 space. And as a result of the misuse of what was customer
24 property, not estate property, that justifies the imposition
25 of a constructive trust.

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1 As far as meeting each and every element of a
2 constructive trust, New York law is clear that all four
3 elements do not have to be met, that these -- this is a
4 flexible test.

5 THE COURT: Just give me a second. I'm looking
6 for something specifically that I should have here. In all
7 the paper I brought out, it's not in what I brought out.
8 Everybody just stay and -- I just want to grab something off
9 my desk. Don't have to get up or anything, just -- I just
10 want to have -- okay.

11 What (audio drops) do is we're going to take a 15-
12 minute recess because I want to read a couple of cases as
13 well. So by my watch it's 10 after 11. We'll -- 11:25,
14 we'll come back and we'll continue with this point. Okay?
15 All right. When I come back in, everybody can remain
16 seated. You don't have to get up.

17 (Recess)

18 THE COURT: All right, Court's back in session.
19 Ms. Kovsky, go ahead.

20 MS. KOVSKY-APAP: Your Honor, before we took a
21 break, we were talking about constructive trust and I think
22 I just need to back up for a second again and make sure that
23 I'm clearly explaining what our position is. Our position,
24 the Withhold Group's position is that just like the Custody
25 assets and just like the pure Withhold assets, the

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1 transferred Withhold assets are not property of the estate.

2 Now, there are different ways of looking at that.

3 The Debtor seems to be taking the position well, if it's not
4 property of the estate, it can be withdrawn from the main
5 aggregated wallets because it's pretty easy to trace those
6 assets. You look --

7 THE COURT: It's not easy to trace the assets.

8 That's the point. It's not easy to trace the assets. Maybe
9 that you trace value, you can say, well, yeah, the
10 aggregated account holds \$100 million or whatever and I'm
11 only asking for 15 million of it. You're not tracing the
12 assets.

13 MS. KOVSKY-APAP: Well, you're not tracing the
14 specific coin --

15 THE COURT: That's right. Exactly that point.
16 You can't trace the specific assets. You can say that your
17 clients are entitled in the aggregate to \$15 million in
18 value, but you can't trace specific assets.

19 MS. KOVSKY-APAP: Well, Your Honor, we're not
20 saying they're entitled to \$15 million in aggregate value.
21 We're saying that they're entitled to certain coins of
22 certain types and in certain amounts, the same as Custody,
23 the same as pure Withhold, and those absolutely can, you
24 know, as Mr. Ortiz said, it's the same thing with
25 hydrocarbon. You're not going to put your name on a

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1 particular hydrocarbon molecule, but --

2 THE COURT: I don't think there was a shortfall in
3 the pipeline case that Mr. Ortiz talked about. The question
4 is how much of what's in the pipeline belongs to this
5 predator or this creditor or that creditor. They weren't
6 dealing -- I don't think they were dealing with shortfall.
7 Here, we're dealing with shortfall.

8 MS. KOVSKY-APAP: Well, Your Honor, it's the same
9 as any case where somebody has a superior claim because they
10 own the assets.

11 THE COURT: Superior claim until it got comingled.
12 And at that point, I don't think you have a superior claim.

13 MS. KOVSKY-APAP: Your Honor, we disagree. We
14 think that --

15 THE COURT: Well, we disagree.

16 MS. KOVSKY-APAP: -- we have a --

17 THE COURT: Go on to your next argument.

18 MS. KOVSKY-APAP: Well, the argument is the
19 constructive trust argument and that's what we were talking
20 about before the break and Your Honor said, well can you
21 meet all four of the elements. My response was, all four of
22 the elements don't have to be met in order to establish a
23 constructive trust.

24 THE COURT: Well, that's not exactly true. There
25 are some cases that say maybe we won't all cases rigidly

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1 require satisfaction of all four elements of New York law
2 with respect to the existence of a constructive correct.

3 MS. KOVSKY-APAP: Correct. As Your Honor stated
4 in the Dewey & LeBoeuf case in 2013. Although these factors
5 provide important guideposts, the constructive trust
6 doctrine is equitable in nature and should not be rigidly
7 limited.

8 THE COURT: Equitable in nature. And is it
9 equitable where assets have been comingled to say that your
10 clients get everything and they take the whole hit; that's
11 the point. Is that equitable? That's contrary to the
12 equality of distribution principle in bankruptcy.

13 MS. KOVSKY-APAP: Your Honor, it's not contrary to
14 the equality of distribution principle. The customers that
15 are taking the hit have coins that they lent to Celsius that
16 are subject to a grant of right and title to Celsius.

17 THE COURT: And they don't have --

18 MS. KOVSKY-APAP: My clients do not.

19 THE COURT: -- shortfall. You've agreed there's a
20 shortfall.

21 MS. KOVSKY-APAP: I agree there's a shortfall, but
22 that's the risk that they took. They lent --

23 THE COURT: That's the risk that who took?

24 MS. KOVSKY-APAP: The customers in Earn.

25 THE COURT: It's also a risk that the customers

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1 who think that they have a trust or they think the terms of
2 use, that it belongs to them, it doesn't exist anymore.

3 Okay, then the question is, it was in a commingled account.

4 Do the rules require an allocation of that loss? You say
5 no; we'll see. I have your point.

6 MS. KOVSKY-APAP: Thank you, Your Honor. And I've
7 been up here for quite a while so I will try to wrap up and
8 I just want to return to one more point about constructive
9 trust, which is the unjust --

10 THE COURT: No. Go on.

11 MS. KOVSKY-APAP: All right, just to sum up, the
12 question is, should the Withhold account holders, should the
13 Withhold assets be treated differently from the Earn assets?
14 Should they be treated like the Custody assets? We believe
15 that there is a material distinction between assets that are
16 on loan to Celsius and subject to a contractual grant of
17 title and assets that were already legally returned to the
18 customers and subsequently converted and misused by the
19 Debtors. Because these assets were returned to the
20 customers, they were separately tracked. They were in a
21 different account. They were legally different --

22 THE COURT: They weren't in a separate account.
23 They were on a separate ledger entry.

24 MS. KOVSKY-APAP: And that's how Celsius set up
25 its accounts, by ledger entries. They weren't in a separate

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1 wallet. They were in a separate account. Those are two
2 different things, Your Honor. We believe that it would be
3 appropriate and equitable to treat the Withhold assets the
4 same as the Custody assets because legally that's really how
5 they're situated. There's no rational distinction,
6 particularly when you're talking about Withhold -- just
7 Withhold assets, there's no (audio drops). The pure
8 Withhold assets can go back to the customers, but the
9 transferred Withhold assets cannot.

10 Either way, if it's a Withhold asset, it's not
11 property of the estate. It's no longer on loan to Celsius.
12 Celsius had no contractual right to do anything with these
13 assets. The fact that Celsius misused them should not be to
14 the detriment of --

15 THE COURT: They lost track of them. That's --

16 MS. KOVSKY-APAP: Well, no, they tracked the
17 Withhold assets. They know to the, you know, hundredth or
18 thousandth of a piece of Bitcoin exactly how many coins are
19 allocated to the Withhold accounts. And they're -- all of
20 the coins that are necessary to make all of those coin
21 owners whole, to give them back their coins, they're there.

22 THE COURT: There's not enough in the commingled
23 account to give everyone who had Bitcoin what they believe -
24 - what they're entitled to.

25 MS. KOVSKY-APAP: There's enough in the commingled

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1 account to give everyone whose assets were legally already
2 returned to them all of the Bitcoin that they're entitled
3 to, whether they're pure Withhold, pure Custody, regular
4 Custody, or regular --

5 THE COURT: I have your point. Anything else?

6 MS. KOVSKY-APAP: That's it, Your Honor.

7 THE COURT: Okay. All right. Let me hear from
8 the Debtor.

9 MR. KOENIG: Your Honor, again, it's Chris Koenig,
10 Kirkland and Ellis, for the Debtors. We start as we did
11 with Custody with the contractual language because as I
12 noted when we when we were speaking about Custody, every
13 digital asset that is transferred to one user is one less
14 digital asset for everybody else that is general unsecured
15 creditors.

16 Our position is that Custody is different because
17 Custody has clear language providing that the digital assets
18 remain the property of the customers even while they are in
19 the Custody program. Not so for Withhold. There are
20 several places in the terms of use that we should look at.
21 Ms. Kovsky pointed you to Section 4(d) and she's effectively
22 reading words on the page that are not there.

23 I thought I heard her concede that the words were
24 not actually on the page and that that she is reading some
25 sort of inference that it was -- the grant of title was

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1 somehow time limited, but I just don't see the words on the
2 page there. But what's more is if Your Honor turns to --
3 and I think this section will be clearer. Your Honor turns
4 to Section 10 of the Version 8 of the terms of use which is
5 Page 547 of 1126.

6 THE COURT: I'm there.

7 MR. KOENIG: And I'm reading down towards the end
8 of the page. It's the sentence that starts with "We may
9 lend."

10 THE COURT: Yes, go ahead.

11 MR. KOENIG: "We may lend, sell, pledge,
12 hypothecate, assign, invest, use, comingle, or otherwise
13 dispose of assets and eligible digital assets that are not
14 held in a Custody wallet if available to you to
15 counterparties or hold the eligible digital assets with
16 counterparties and we will use our best commercial and
17 operational efforts to prevent losses," and it continues.

18 "By transferring digital assets to Celsius or
19 lending eligible digital assets to Celsius while using the
20 Earn service or otherwise using the services, you will not
21 be entitled to any profits or income Celsius may generate
22 from any subsequent use of any digital assets, nor will you
23 be exposed to any losses which Celsius may suffer as a
24 result thereof. You agree and acknowledge that you are
25 exposed to the possibility that Celsius may become unable to

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1 repay its obligations to you in part or in full, in which
2 case, any digital assets in your Celsius account that are
3 not using the Custody service may be at risk of partial or
4 total loss."

5 So Your Honor, that was a lot of words on the
6 page, but what it boils down to is the Custody service is
7 expressly carved out and is treated differently from other
8 digital assets on the Celsius platform, including Withhold.
9 So not only is Ms. Kovsky reading language into Section 4(d)
10 that isn't there, but her reading is inconsistent with the
11 language in Section 10.

12 THE COURT: Let me ask, because -- I thought I
13 had marked it. The language Ms. Kovsky was referring to
14 where it basically said that the transfer of title is time
15 limited. Which paragraph?

16 MR. KOENIG: That's in 4(d), Your Honor. That's
17 on page 538 and there's another section that Ms. Kovsky was
18 referring to. The language is substantially identical.

19 THE COURT: Okay.

20 MR. KOENIG: Section 13.

21 THE COURT: It's the -- on 538, 539 carryover.
22 "If our Earn service is available to you, upon your election
23 you will lend your eligible digital assets to Celsius and
24 Grant Celsius all rights and titled to such digital assets
25 for Celsius to use in its sole discretion while using the

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1 Earn service." And I guess her point was that once somebody
2 moves it out of the service, you no longer have title to it.
3 Why is that wrong?

4 MR. KOENIG: Your Honor, I believe that the
5 language is -- I think she's reading words into the language
6 that are not there and those words are inconsistent with the
7 language that I just read from Paragraph 10, which is pretty
8 clear, I think, that to the extent there are digital assets
9 -- eligible digital assets, excuse me, that are on Celsius'
10 platform that are not the Custody assets, Celsius -- just
11 flipping back to the language on Pages 547 and 548.

12 "Celsius may lend, sell, pledge, hypothecate,
13 assign, invest, use, comingle, or otherwise dispose of
14 assets. By transferring digital assets, you will not be
15 entitled to any profits or income. You agree and
16 acknowledge that you are exposed to the possibility that
17 Celsius may be unable to repay the obligations to you in
18 part or in full."

19 THE COURT: Okay.

20 MR. KOENIG: And that's exactly the situation that
21 we're in.

22 THE COURT: Okay. Well, when you say that's
23 exactly the situation that you're in, your position now,
24 which again did seem to change from your opening brief, was
25 that Withhold account holders have no -- received no title

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1 to any of the assets when they came out of our -- that was
2 reflected on a ledger, but that didn't alter Celsius having
3 title.

4 MR. KOENIG: Your Honor, I agree. It didn't alter
5 Celsius having title. I'd make a distinction. There were
6 pure Withhold assets for which there was never a contractual
7 grant of title. The example you gave earlier, there's a
8 coin that simply wasn't supported on the platform and
9 couldn't be part of your Celsius account, that's different
10 because the customer never conveyed title and the Debtors
11 never accepted that title.

12 With respect to Withhold assets that were at one
13 in Earn, there was a contractual grant of title in Section
14 4(d) and elsewhere in the terms of use and the language in
15 4(d) is silent about what happens when the title is moved to
16 another service.

17 THE COURT: So this really -- you've got a
18 contract that's silent on Withhold. And are there legal
19 principles by which a Court finds an implied contract or do
20 you have to move directly to the constructive trust
21 arguments? I mean, what -- it clearly, your position is
22 that the four corners of Version 8 of the terms of use do
23 not contractually explain what happens when crypto assets
24 move out of Earn accounts into no man's land of the
25 Withhold.

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1 MR. KOENIG: That's right, Your Honor. What I'd
2 also add is I think, to put a little bit of a finer point on
3 our position, which I admit changed from the first brief to
4 the second brief, these are tough contractual issues. We
5 said in our first brief that we thought it was a close call.
6 And you know, as we continued to review and had the benefit
7 of reading --

8 THE COURT: Well, you had the benefit of the
9 Committee's position --

10 MR. KOENIG: And --

11 THE COURT: -- and changed your mind.

12 MR. KOENIG: I don't disagree with that, Your
13 Honor.

14 THE COURT: You still agree it's a close call?

15 MR. KOENIG: I still agree it's a close call, Your
16 Honor. I still think it's a close call.

17 THE COURT: So assuming the close call was decided
18 in favor of Withhold, what are the consequences of that?

19 MR. KOENIG: If by close call was decided in favor
20 of Withhold, that Withhold is property of the customers
21 under the contract? I think in that situation they would be
22 identical to Custody in that they are entitled to the return
23 of their property, subject to the issue we're going to talk
24 about in a minute about whether we can maintain possession
25 and control because of pending preference and other claims.

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1 But I think that, you know, we certainly conceded
2 that Custody assets to the extent they are not property of
3 the estate should be returned to their owners, subject to
4 what we're going to talk about in a minute. And I have the
5 same view on Withhold.

6 THE COURT: And what about the shortfall that Ms.
7 Kovsky and I were fencing about?

8 MR. KOENIG: I think that the shortfall, Your
9 Honor --

10 THE COURT: Is it only five coins that we're
11 talking about?

12 MR. KOENIG: It's only five coins that we're
13 talking about. The shortfall that we're talking about, I
14 think comes more into play in the constructive trust realm.
15 And as we laid out in our brief, and I'm happy to walk
16 through in more detail, I don't think that Ms. Kovsky has --
17 I don't think that Ms. Kovsky has addressed the other
18 elements. She said, oh, maybe you don't need all the
19 elements. I don't think that she's met any of the elements.

20 She suggests that there is a promise, express or
21 implied. What's the promise? There's language that is
22 missing from the agreement. What's the promise? There's an
23 element that's a transfer in reliance on the promise.
24 There's no promise and her own clients' declarations say
25 that they weren't even aware of a Withhold account until

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1 after they transferred. So how could the transfer have been
2 in reliance on a promise about Withhold program that they
3 knew nothing about?

4 I just don't think that they've met the elements
5 of a constructive trust, and as Your Honor explained, a
6 constructive trust is extraordinary remedy. And as we laid
7 out in our brief, a constructive trust is supposed to be
8 fraud rectifying. And there's no -- I don't believe that
9 there's any allegation of fraud here. I heard Ms. Kovsky
10 say oh, well, in cryptocurrency generally there's, you know,
11 fraud abounds, but that's not what we're talking about.

12 We're talking about this case and the record
13 before Your Honor. I don't believe that there's any
14 credible allegation of fraud.

15 THE COURT: So what would be the result if I
16 conclude that Ms. Kovsky is correct in interpreting the
17 contract, okay. So in terms of the ledger, reflected it
18 came out of Earn and into Withhold, but it was comingled.
19 And at least some of the coins, there's a shortfall. What
20 happens then? What are the rules for allocating? Do the
21 Withhold account holders get 100 percent and it diminishes
22 the recovery of unsecured creditors?

23 MR. KOENIG: I think that to the extent Your Honor
24 rules that the contract provides that Withhold assets are
25 not property of the estate, then that is the outcome.

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1 That's the identical outcome that we believe would be
2 appropriate for Custody. Again, assuming, you know, putting
3 to the side for the moment, you know, that the second issue
4 today.

5 THE COURT: Okay.

6 MR. KOENIG: But again, she has to have a
7 contractual argument and we don't believe that that's -- we
8 believe that Withhold is different from Custody --

9 THE COURT: Step one, you disagree with her that
10 the contract should be interpreted that when Celsius made
11 ledger entries removing assets from Earn and into Withhold
12 that that did not transfer title to the assets.

13 MR. KOENIG: The ledger entries by themselves do
14 not transfer title. A contractual agreement is needed.
15 That's what differentiates Custody from Withhold because the
16 terms of use are very clear in a variety of different areas
17 that we talked about this morning and that are in our brief,
18 that are clear that the Custody property, the Custody assets
19 remain property of the customers. There is no such language
20 for Withhold.

21 THE COURT: Okay.

22 MR. KOENIG: And what's more, so if there isn't
23 clear language, what should the Court look to? And then we
24 have to start to get into extrinsic evidence and what the
25 examiner found was that the Debtors treated the Withhold

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1 assets as the Debtors' property. They -- the Debtors
2 deployed the Withhold assets. It is not as though they kept
3 them separate or kept them safe. It is not as though they
4 tried. It's not as though the Debtors tried to establish a
5 separate Withhold wallet or fire blocks workspace as they
6 did for Custody.

7 So the Debtors' intent not only in the terms of
8 the contract but in what played out in real life is very
9 different for both Custody and Withhold. The Debtors never
10 -- the Debtors treated the Withhold assets as their property
11 and there wasn't a contractual agreement to the contrary.
12 So simply put, our view is that the Withhold users are
13 effectively the same as every other user that got stuck on
14 the system who tried to withdraw and were unable to get
15 fully off the platform before the pause.

16 THE COURT: Let me ask specifically on that.
17 People tried to -- account holders tried to withdraw assets
18 from the platform. Some thought they had succeeded only to
19 find out that they hadn't. In terms of Celsius' ledger, how
20 were things recorded in the ledger when Joe Smith put in
21 instructions to withdraw everything that he or she -- you
22 know, that he had in an Earn account? How was that --

23 MR. KOENIG: From Earn to Withhold you mean, Your
24 Honor?

25 THE COURT: No. Now I'm talking about Custody

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1 again.

2 MR. KOENIG: Okay.

3 THE COURT: Let's put -- I'm just trying --
4 whether it's Withhold or Custody, I think would -- really
5 the same question.

6 MR. KOENIG: Right,.

7 THE COURT: How was -- so when an account holder
8 sought to withdraw assets and got caught in the pause, how
9 was -- how did that all get recorded in the books and
10 records of Celsius?

11 MR. KOENIG: Your Honor, it depends on -- I hate
12 to say it depends, but it depends on where they were when
13 the pause sort of came down, right? If the user tried to
14 withdraw at the moment of the pause or the moment after the
15 pause, they may have gotten caught in Earn. If a user tried
16 to withdraw all the way off the platform in Earn and got
17 sort of in the way station of Custody or for the users in
18 the nine prohibited states in the way station of Withhold,
19 that transfer would take place on the ledger
20 instantaneously, pursuant to the Debtors' technology, but
21 then it needed to be further withdrawn.

22 And for the Withhold users, they received an email
23 saying you need to come and get this. You need to tell us
24 where to send this property. We cannot simply send it to
25 you. And so it got stuck there. And so that's why we have

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1 the Withhold users to begin with, but you can track it on
2 the ledger when it moves from Earn to Withhold and why it's
3 stuck there.

4 THE COURT: So what provision of the terms of use
5 are you relying on that title remain with Celsius until the
6 funds wound up back with -- well, when it went into Custody.
7 We'll deal with that separately. Because you say when it
8 went into Custody, you say title passed.

9 MR. KOENIG: Yes, Your Honor.

10 THE COURT: Contract.

11 MR. KOENIG: Yes.

12 THE COURT: What about with Withhold?

13 MR. KOENIG: With Withhold, I'd point you again to
14 Section 10, Section 4(d). I don't read the words into
15 Section 4(d) that Ms. Kovsky does. I think the contract is
16 silent on what happens when it comes out of Earn. I think
17 that I think that Section 10 is clear that it is excluding
18 from title being with Celsius only the Custody assets, not
19 any other assets that are on the Celsius account, and I
20 think that that's very significant.

21 THE COURT: Would you agree that to the extent
22 that the written words of the contract don't state what the
23 legal status of Withhold assets are, that the Court can't
24 decide the issue based on the four corners of the contract?

25 MR. KOENIG: By that --

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1 THE COURT: Yesterday, I heard arguments about who
2 owns the Earn assets and it was a question of is the
3 contract clear and unambiguous. Nothing in the contract.
4 Nothing in this contract deals with Withhold.

5 MR. KOENIG: Your Honor, I think to the extent you
6 find that Section 10 is not talking about Withhold at all,
7 which I think would be, you know, one conclusion that Your
8 Honor could draw, if what you're saying is that there are no
9 words in the contract expressly dealing with Withhold, then
10 I don't see what other alternative Your Honor would have,
11 but to look outside the four corners of the contract. And I
12 think when Your Honor --

13 THE COURT: I'm just trying to figure out what I
14 can decide and what I can't decide --

15 MR. KOENIG: Right. Right.

16 THE COURT: -- on the motion. And I think once
17 Your Honor does look outside the four corners of the
18 contract, the Debtors' intent and use of property is clear
19 as outlined in the examiner's report and Mr. Blonstein's
20 declarations. But I don't need to belabor the point.

21 THE COURT: Okay.

22 MR. KOENIG: Just going back to the contractual
23 point for a moment, Ms. Kovsky hasn't pointed to any intent
24 of the Debtors other than the language in 4(d) that I think
25 she's reading into, to -- by the Debtors to relinquish title

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1 to the transferred Withhold assets. I don't think there's
2 any disagreement that title was with the Debtors while it
3 was in Earn. There is no language in the contract that
4 provides that title passed back to --

5 THE COURT: Except for everybody yesterday --

6 MR. KOENIG: -- Custody.

7 THE COURT: All the pro ses yesterday would
8 disagree with that statement, but --

9 MR. KOENIG: I understand their position, Your
10 Honor. But there's no intent in the language of the
11 contract or intent in the actions of the Debtors to
12 relinquish the title.

13 Your Honor, I got into the constructive trust
14 argument a little bit. I don't know if you have any
15 additional questions for me on that. I don't want to
16 rehash.

17 THE COURT: Tell me -- you say you don't believe
18 that the Withhold, the Ad Hoc Committee has established the
19 elements of a constructive trust.

20 MR. KOENIG: Yes.

21 THE COURT: Just give me a second.

22 What I understand the elements of constructive
23 trust in New York law, the party claiming a constructive
24 trust must establish four elements: confidential or
25 fiduciary relationship; two, a promise expressed or implied;

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1 three, a transfer of the subject res made in reliance on
2 that promise; and four, unjust enrichment. You agree with -
3 - those are the four elements?

4 MR. KOENIG: Yes, Your Honor.

5 THE COURT: And have the Withhold -- Ad Hoc
6 Committee of Withhold, have they established, one, a
7 confidential or fiduciary relationship?

8 MR. KOENIG: Your Honor, I don't -- maybe I missed
9 it in their brief. I don't believe they've even alleged it
10 and I don't believe that that -- that even if they had
11 alleged it, that that element has been met because the
12 Debtors and the customers that are arm's length commercial
13 relationship, that's not a confidential or fiduciary
14 relationship. I'd point Your Honor to Ames Department
15 Stores, 274 B.R. 600 and Mid-Island Hospital, 276 F.3d 123.

16 THE COURT: All right. The second element, a
17 promised express or implied. Have they satisfied that?

18 MR. KOENIG: They have not, Your Honor. They
19 haven't. They can't point to any language in the contract
20 that could be a promise. I haven't seen any evidence that
21 they -- that these individuals, you know, received any
22 communications from Celsius that would constitute a promise.
23 And as I mentioned earlier, I think that their own
24 declarations say that they weren't even aware of the
25 Withhold accounts until after the transfer was made out of

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1 Earn.

2 THE COURT: And I guess that would -- you'd also
3 deal with the transfer of the subject res made in reliance
4 on that promise, they didn't know about -- didn't even know
5 about the Withhold accounts.

6 MR. KOENIG: Yes. Same answer.

7 THE COURT: What about the unjust enrichment?

8 MR. KOENIG: I don't think that there's unjust
9 enrichment here. I think unjust enrichment is a high
10 standard to meet. I think that the Debtors clearly
11 communicated to the affected users that they should withdraw
12 the assets off the platform. It's not like the Debtors took
13 any untoward acts to retain this property. These folks, the
14 Withhold users got stuck on the platform like everybody else
15 did. It's not as though the Debtors took any actions that
16 should be unwound because they were unjust in some way. The
17 Debtors were doing their best --

18 THE COURT: Treat everybody the same.

19 MR. KOENIG: The Debtors were doing their best to
20 handle the overwhelming amount of withdrawals around the
21 pause and these folks got caught just like everybody else
22 got caught on the system. The only difference is Custody,
23 because Custody has the contract.

24 THE COURT: If the Court agreed with Ms. Kovsky
25 that the contract should be interpretive, that title was

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1 held by the Debtors only when it was in Earn and it went
2 into this Withhold that's not covered by the contract, and
3 to the extent there is a shortfall and if it's five of the
4 coins, just hypothetically, how would the shortfall be
5 allocated?

6 MR. KOENIG: Is this in a constructive trust
7 world, Your Honor, or are the coins the property of the
8 Withhold users?

9 THE COURT: Well, let's take it if it's property
10 of the Withhold users.

11 MR. KOENIG: I think --

12 THE COURT: You agree with Ms. Kovsky that then
13 they get it and it's the unsecured creditors who bear the
14 entire --

15 MR. KOENIG: I do, because that's the position
16 that we've taken with respect to Custody. So to the extent
17 Your Honor finds that the contract provides that it remains
18 the property of the withhold users, then that's what the --
19 that's what the result should be.

20 THE COURT: Okay. And I guess if title didn't
21 pass, your view is then you don't even get to this issue of
22 shortfall and just, they're treated just the way all other
23 unsecured creditors --

24 MR. KOENIG: They're unsecured creditors, just
25 like everybody else who tried to withdraw and failed to get

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1 off the platform, other than Custody.

2 THE COURT: Okay.

3 MR. KOENIG: I would just add that the burden is
4 on the Withhold users to demonstrate that it's their
5 property. And I think that the contract -- and I may be
6 flip-flopping again and I apologize -- but just thinking out
7 loud, the contract provided for a clear conveyance of title
8 from the users to Celsius when it was in the Earn program.

9 It was not -- there was no clear conveyance of
10 title back. I think that the burden is on the Withhold
11 users to demonstrate a clear conveyance of title back. And
12 I don't believe that they have been able to point to any
13 language or action that that leads to that result.

14 THE COURT: And what is the result if I find the
15 contract ambiguous with respect to relying on Ms. Kovsky's
16 argument about the last clause in 4(d) about basically title
17 for Celsius to use in its sole discretion using the Earn
18 (audio drops). It came out the (audio drops) terms of the
19 ledgers of Celsius, the assets came out of Earn. They no
20 longer earned a reward. They were in this no man's land.
21 Is that an ambiguity? Do I have (audio drops) to be able to
22 resolve this?

23 MR. KOENIG: Your Honor, I don't think that it's
24 ambiguous. I think the contract is silent. I think silence
25 is different from ambiguity, and again, I'd point to Section

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1 10 which I think is a little bit clearer than Section 14,
2 which is silent. I think Section 10 speaks to this issue a
3 little bit more directly. It doesn't use the word Withhold,
4 but I think it clearly carves out Custody and only Custody.
5 And so all other eligible digital assets, using the defined
6 term, would be, you know, would remain property of Celsius
7 and Celsius would have the right to lend, sell, pledge,
8 rehypothecate, assign, invest, use, et cetera, as set forth
9 in Section 10.

10 THE COURT: I've got to split back to the
11 definition of eligible digital assets on Page 527 of 1126.

12 MR. KOENIG: I'm with you, Your Honor.

13 THE COURT: Is services a defined term? I don't
14 see it listed here.

15 MR. KOENIG: It's on the prior -- it's before the
16 definitions, Your Honor. It's on Page 521 of 1126.

17 THE COURT: Okay. Was Withhold a service? I
18 mean, it was on the app.

19 MR. KOENIG: Your Honor, reading the language, the
20 language in Section 1 that's on Page 521 is extremely broad.
21 It is, "Each user's access to and use of Celsius' products
22 and services as well as our mobile and web based
23 applications, websites, software programs, documentation,
24 tools" -- there's a lot of other words there but --
25 "provided to you by Celsius directly or indirectly through

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1 our mobile application, or website, or any other online
2 service" --

3 THE COURT: Was Withhold on the app?

4 MR. KOENIG: There were Withhold accounts and you
5 could see your balance as a Withhold account. And so Your
6 Honor, I believe that it's within the definition of services
7 and just to correct something that I said on Paragraph 10, I
8 said "eligible digital assets" and I believe that the end of
9 Paragraph 10 actually says "in which case any digital
10 assets," not any eligible digital assets.

11 I think that's a distinction without a difference
12 given the definitions, but I just wanted to correct --

13 THE COURT: All right.

14 MR. KOENIG: -- the record.

15 THE COURT: Thank you.

16 MR. KOENIG: That's all I have, Your Honor.

17 THE COURT: Thank you.

18 MR. KOENIG: Thank you.

19 THE COURT: For the Committee?

20 MS. AMULIC: Good afternoon, Your Honor. Andrea
21 Amulic, White and Case, for the Committee.

22 So as an initial matter, the Committee does not
23 agree that the terms of use are silent as to when title
24 transfers. Section 11 of the terms of use say that a loan
25 obligation -- I'll give you a second --

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1 THE COURT: Just a second. Let --

2 MS. AMULIC: Yeah.

3 THE COURT: Okay, I'm on Section 11. Which
4 language are you referring to?

5 MS. AMULIC: The language that says a loan
6 obligation terminates upon repayment. So the exact language
7 --

8 THE COURT: Where is that?

9 MS. AMULIC: Yep.

10 THE COURT: This goes on for several pages, so --

11 MS. AMULIC: So first paragraph, second sentence.
12 "Such repayment will terminate in whole or in part your loan
13 to Celsius."

14 THE COURT: Okay. And the -- what's the import of
15 that language?

16 MS. AMULIC: They haven't been repaid. So if the
17 Withhold group had requested to transfer out of Earn through
18 their Withhold account and received the funds in their
19 external wallets, that's repayment. They have not been
20 repaid. That's why they're here.

21 THE COURT: And essentially your argument based on
22 Section 11 would apply to all Earn account holders that
23 sought to withdraw their assets and because of the pause or
24 whatever was not completed?

25 MS. AMULIC: Correct, and regardless of where they

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1 live, right, because the only difference between the
2 Withhold Group and other Earn account holders who similarly
3 got stuck during the pause is that the Withhold Group
4 happened to live in one of nine states. So -- and your
5 Court's already denied a creditor's request to lift the stay
6 to recover his assets when he got stuck in a withdrawal
7 attempt. There's no --

8 THE COURT: (indiscernible).

9 MS. AMULIC: That's right, yeah. And--

10 THE COURT: -- opinion on that.

11 MS. AMULIC: -- there's no difference, there's no
12 meaningful difference between his entitlements to assets he
13 had initially transferred as part of the Earn Program --

14 THE COURT: Okay.

15 MS. AMULIC: -- and Withhold Group's assets they
16 had initially transferred as part of the Earn Program.

17 THE COURT: Okay.

18 MS. AMULIC: Ms. Kovsky also seems to be asking
19 Your Honor to do quite a bit by way of negative implication
20 and in light of the express terms I've just read, we submit
21 that the title did not transfer to Withhold account holders
22 at the time of clicking to transfer an account balance from
23 Earn to Withhold account.

24 Would also like to address just kind of a -- maybe
25 a mischaracterization that a lot of folks are operating

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1 under. There are no Withhold assets. There are assets that

2 --

3 THE COURT: They're comingled assets.

4 MS. AMULIC: Exactly.

5 THE COURT: -- account, but --

6 MS. AMULIC: Exactly. And the Withhold account
7 balances merely track obligations, amounts corresponding to
8 some assets in that pool. And the big difference between
9 Custody -- and I disagree with Ms. Kovsky -- is that Celsius
10 created a space for Custody holders to look to for
11 recoveries. They didn't yet maybe practically have the
12 technology to segregate individual coins, but they said,
13 here's this bucket and then they wrote the terms of use to
14 say, you look to that bucket. Anything in that bucket in
15 the wallet is Custody.

16 Any -- that's why it doesn't say Custody assets.
17 It says assets in Custody wallets. Celsius did not create a
18 space for the Withhold Group. They knew the balances. They
19 could have, you know, said, well, here's a little bucket for
20 you too and we're actually actively asking you to withdraw.
21 They didn't do that. They treated these assets exactly as
22 their own assets, exactly as Earn assets. And that's
23 relevant, right? Like they saw no distinction between this
24 group and regular Earn account holders.

25 And just for completeness, to the extent Your

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1 Honor finds that there is no terms of use that governs, it's
2 the conduct of the parties that's relevant.

3 THE COURT: Conduct of the parties, I can't decide
4 right now. I mean, do you agree with that?

5 MS. AMULIC: On the --

6 THE COURT: That's --

7 MS. AMULIC: -- record?

8 THE COURT: -- extrinsic evidence.

9 MS. AMULIC: Correct, but I'm saying if you were
10 to find that the contract was not facially unambiguous, we
11 would look to that and we would look to the conduct of the
12 parties and understanding you can't decide it right now, it
13 clearly shows that Celsius treated these assets as estate
14 property.

15 I mean, unless Your Honor has -- oh sorry. One
16 more. With respect to the pure Withhold, we do actually
17 dispute that those assets should be returned to the
18 customers. I believe Ms. Kovsky said we didn't. Again,
19 that's a situation in which it's more arguable that a
20 contract does not govern because --

21 THE COURT: How -- if somebody deposited an XYZ
22 coin that Celsius did not permit to be deposited on its
23 platform, how is it, in your view, that title to that passed
24 to Celsius?

25 MS. AMULIC: Because Celsius didn't set it aside

1 or designate it or do any --

2 THE COURT: -- have no trouble tracing it. They
3 just -- it never went anywhere. I mean, it was in no man's
4 land. It didn't -- you know, your, the unsecured creditors
5 didn't have a claim to that particular species of -- isn't
6 that true?

7 MS. AMULIC: That -- yes, that makes sense. We
8 don't, however, know what the breakdown is between pure
9 Withhold users that transferred, for example, the Binance
10 coin which wasn't supported versus folks who transferred
11 after April 14th but we're in an unaccredited state. And
12 those, that second category --

13 THE COURT: What I understand, the pure Withholds
14 to be and that goes back before they created the Custody
15 accounts. People -- some people tried to deposit species of
16 crypto that Celsius did not accept for its platform.

17 MS. AMULIC: So in the Debtors' initial motion
18 that kicked all of this off, they explained that pure
19 Withhold as we're using it, is yes, that group of people but
20 also people against whom there isn't really a preference
21 issue because they weren't coming from Earn to Withhold.
22 They were coming from external wallet to Withhold and
23 because of the nature of the blockchain, if they were
24 residing in one of the prohibited states and they put in
25 Celsius' wallet address as the recipient on the blockchain,

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1 Celsius can't block it.

2 Once it's at Celsius, they can say oh no, that
3 person is in a prohibited state. This must be associated
4 with a withholding.

5 THE COURT: Celsius never treated -- I don't know
6 what the volume of it is. Does anybody know what the --

7 MS. AMULIC: The pure Withhold is around 700,000.
8 I don't know how many of those are the unaccepted coins
9 versus the pure transfers.

10 THE COURT: Okay. Go ahead.

11 MS. AMULIC: And again, with respect to that
12 second group which is the transfers external to Celsius but
13 marked Withhold, Celsius again commingled those assets,
14 treated them as Celsius assets, used them, deployed them,
15 didn't segregate them. It's the same --

16 THE COURT: It had to be of a crypto type that
17 Celsius would accept.

18 MS. AMULIC: In that case, yes. So there's two,
19 right. There is the kind that Celsius can accept, there's
20 the kind that they can, and in that second case if I were
21 living in, I think Louisiana for example, and I transfer --
22 you know, I go on the blockchain and I, you know write
23 Celsius as the recipient, that's done, the transfer is done.
24 And so Celsius can't stop it. So now they're holding this
25 asset which they can't really hold, so they're saying, okay

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1 this person has a withhold account balance, put the asset
2 into the aggregator, use it, do whatever you want with it.

3 THE COURT: I'm sorry, I missed that last?

4 MS. AMULIC: Use -- they can use it.

5 THE COURT: Did they?

6 MS. AMULIC: Yeah. They comingled and --

7 THE COURT: Well, did they use -- I mean, what did
8 they do? They've got -- did they deploy the assets that
9 were not permitted to be -- that they didn't accept on their
10 platform?

11 MS. AMULIC: The assets they didn't accept, for
12 example, the Binance coin, no, I don't think so actually,
13 rather.

14 THE COURT: Okay.

15 MS. AMULIC: The assets that were the kind they
16 could accept but came from a user in a prohibited state,
17 yes.

18 THE COURT: Sure.

19 MS. AMULIC: They aggregated those with --

20 THE COURT: Just -- the Binance.

21 MS. AMULIC: Yeah, that --

22 THE COURT: They didn't deploy Binance.

23 MS. AMULIC: I will defer to the Debtors on that,
24 but that's certainly not the group I'm trying to address.

25 THE COURT: Okay.

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1 MS. AMULIC: And if Your Honor has no more
2 questions, that's all I have prepared.

3 THE COURT: Okay. Let me see whether anyone wants
4 to respond to the Committee or the Debtors with -- Ms.
5 Kovsky, do you want to respond?

6 MS. AMULIC: Thank you.

7 MS. KOVSKY-APAP: Okay. Deb Kovsky for the Ad Hoc
8 Withhold Group again. First, I want to address something
9 that Mr. Koenig said repeatedly, that I was reading words
10 that are not on the page and Your Honor, I'm very puzzled by
11 that because I'm pretty sure I read them verbatim off of the
12 page.

13 THE COURT: Ms. Kovsky, you read the words that
14 were on the page.

15 MS. KOVSKY-APAP: All right. I just wanted to
16 make sure that --

17 THE COURT: I think their point is that those
18 words don't do what you say they do. You read the words
19 correctly.

20 MS. KOVSKY-APAP: Thank you, Your Honor. Just
21 wanted to make sure that that point was clear.

22 THE COURT: Certainly.

23 MS. KOVSKY-APAP: Then I think the Debtors, again,
24 are making the same argument with respect to the terms of
25 use around Earn that they were making previously that

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1 they're saying these words are on the page, which we all
2 agree they're actually on the page. They say they don't
3 mean what I say they mean. If there's any ambiguity in how
4 those words are to be interpreted, that ambiguity has to
5 fall in favor of the customers.

6 THE COURT: No. Then extrinsic evidence becomes
7 relevant to the Court's interpretation. It may be at the
8 end of the day, the Court decides in your favor, but I don't
9 understand the rule to be that you look at the language of
10 the contract. If the Court determines it's ambiguous, I
11 decide for you. At that point, I may have to take extrinsic
12 evidence and that extrinsic evidence may be the treatment
13 that if there was a consistent treatment that Celsius
14 applied to the language. Is there something you think that
15 says, don't take extrinsic evidence, just decide for me?

16 MS. KOVSKY-APAP: No, Your Honor, not at all. My
17 point was more that to the extent that there is ambiguous
18 language and it could be interpreted in a couple of
19 different ways potentially, case law indicates that it ought
20 to be construed against the drafter.

21 THE COURT: But --

22 MS. KOVSKY-APAP: That was my --

23 THE COURT: Caselaw doesn't say don't consider the
24 extrinsic evidence. First, I have to decide whether there's
25 ambiguity. If there's ambiguity, then the Court can take

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1 extensive evidence. When I listened to the -- I'm tired --
2 extrinsic evidence, it may be that the scale weighs to you
3 at that point, but I don't just look at the language and
4 say, oh that language is ambiguous. I'll decide for the
5 Withhold.

6 MS. KOVSKY-APAP: No, of course, Your Honor, and
7 that was not at all the point I was trying --

8 THE COURT: That's what I thought you were saying.

9 MS. KOVSKY-APAP: No, no, no, no, no. No. I was
10 saying that Celsius is saying the opposite that it's
11 ambiguous, therefore their interpretation must prevail and
12 I'm saying --

13 THE COURT: They're saying it's not ambiguous.
14 They're saying that read the four corners of this document.
15 It's not ambiguous and the result is Celsius kept title to
16 it. Okay. You say it's unambiguous because title
17 transferred was time limited for the time that it was in
18 Earn. Okay. It's interesting because I've had other cases
19 where each side said the contract is clear and unambiguous
20 and favors my client, but they take diametrically opposed
21 views about what it means.

22 MS. KOVSKY-APAP: And this --

23 THE COURT: My view is at that point, one of you
24 is going to win at the end of the day, but only after I've
25 given each side a chance to provide the extrinsic evidence.

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1 It gets harder for you, perhaps, if your clients didn't even
2 have a clue that there was such a thing as Withhold.

3 MS. KOVSKY-APAP: Well, Your Honor, let me address
4 that, because I heard Mr. Koenig say that a couple of times
5 and I was really shocked because that's actually contrary to
6 what every single one of my clients put in their
7 declarations.

8 THE COURT: If we get to the issue about extrinsic
9 evidence, that isn't going to get decided right now, okay.
10 I will decide whether, I think this contract is clear and
11 unambiguous for you or for them and we'll see where we go
12 from there.

13 MS. KOVSKY-APAP: Well, going back to the terms of
14 the contract, Mr. Koenig made quite a point about the risk
15 disclosure provision in Section 10 of the terms of -- are we
16 okay over here?

17 THE COURT: No, I think the door seems to be
18 locked from the out --

19 MR. KOENIG: It locks when it closes.

20 THE COURT: Yeah, I've got a key to -- we'll see
21 whether anybody knocks on the door.

22 MS. KOVSKY-APAP: Okay.

23 THE COURT: I have a key that'll unlock it. I
24 thought it was -- I guess the doors were open when everybody
25 came in. Go ahead, Ms. Kovsky.

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1 MS. KOVSKY-APAP: All right. So going back to
2 what Mr. Koenig was arguing about the risk disclosure
3 provision of the terms of use, at best, it's ambiguous
4 whether these -- this provision, the risk disclosures apply
5 to Withhold. Withhold's never mentioned there and
6 importantly, the entire risk disclosure is framed in terms
7 of using Celsius' services and Your Honor had raised the
8 question as to whether Withhold constituted a Celsius
9 service.

10 Mr. Koenig said, well yeah, it was a service.
11 That's not what he said in his Custody and Withhold motion
12 where he expressly stated on behalf of his clients the
13 Debtors as a judicial admission, the Withhold account -- and
14 I'm going to read this directly --

15 THE COURT: You know, I've had this issue of
16 what's a judicial admission or not. I'm not -- you know, I
17 don't buy it exactly, in the briefs, but go ahead.

18 MS. KOVSKY-APAP: Well, let's say for insight into
19 what the Debtors actually thought about whether this was a
20 service, what they said before was the Withhold accounts
21 were not part of Celsius' service offerings and the Debtors
22 have no contractual claim to title to the cryptocurrency and
23 Withhold accounts.

24 THE COURT: (indiscernible).

25 MS. KOVSKY-APAP: Previously, they said this was

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1 not a service and the reality is there was not a lot that
2 anyone could do with coins that were in the withhold
3 account. Really, you could withdraw them, you could make
4 payments on a loan or you could meet a margin call. Those
5 are the only things you could do, but you couldn't access
6 any of the services that Celsius was providing. So it seems
7 a little disingenuous to then say, well, these risk
8 disclosures that apply to Celsius services apply to this,
9 what we've called the no man's land where services really
10 aren't being offered.

11 Interestingly, the Debtors' argument is also
12 somewhat logically inconsistent regarding the risk
13 disclosure because if it applies to everything on the
14 platform regardless of how it got there or what its status
15 is, if it's not in Custody, if you're on the platform, well
16 then that would apply with equal force to pure Withhold, and
17 clearly the Debtors' position is pure Withhold is not
18 subject to these same issues, to these same contractual
19 provisions. The Debtors' --

20 THE COURT: The pure Withhold never -- did not go
21 into an Earn account.

22 MS. KOVSKY-APAP: They never were -- right. There
23 was never a contractual grant of right and title in the
24 first instance. They did, however, go into commingled Earn
25 wallets.

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1 THE COURT: I understand. There isn't going to be
2 any tracing issue because it didn't go anywhere, it stayed
3 there. They can trace back who it --

4 MS. KOVSKY-APAP: No, I don't think that's
5 correct, Your Honor.

6 THE COURT: Did they sell the Binance? Did they
7 deploy the Binance?

8 MS. KOVSKY-APAP: I'm not talking about Binance,
9 Your Honor. I'm talking about Bitcoin and Ethereum and
10 other eligible digital -- otherwise --

11 THE COURT: -- okay.

12 MS. KOVSKY-APAP: Right. No, so I think the
13 Binance issue is a very small side issue. There are coins
14 that would otherwise have been eligible digital assets that
15 were deposited and the only reason that they weren't really
16 supposed to be there is because they were coming from
17 prohibited states,

18 THE COURT: Okay.

19 MS. KOVSKY-APAP: And those went right into the
20 aggregated main wallets. They were used, deployed, et
21 cetera. They can be traced in the sense that there's ample
22 coins of the same type that can be returned to the owners of
23 the coins and the Debtors are prepared to do that. For
24 reasons that are really not clear to me, they're saying that
25 well, if they were transferred from Earn to withhold as

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1 opposed to landing in withhold from an external wallet, all
2 of a sudden the treatment is completely different.

3 I do want to correct the record. I understand
4 that Your Honor is not taking extrinsic evidence, but Mr.
5 Koenig did make some factual statements about what my
6 clients knew and when they knew it that are just not
7 accurate.

8 THE COURT: I understand that.

9 MS. KOVSKY-APAP: Talked about the Debtors'
10 intent, that there was never any intent that these assets --

11 THE COURT: I can determine -- I may or may not be
12 able to determine intent from the four corners of the
13 document.

14 MS. KOVSKY-APAP: That is likely correct. It's --

15 THE COURT: It is correct.

16 MS. KOVSKY-APAP: Yes. Well, yes, it may or may
17 not be able to determine intent. We think that you can
18 determine intent from the four corners of the document.
19 Again, customers who granted rights to their assets, their
20 property, weren't making, you know, a forever and ever grant
21 of that right and title without any kind of limitations.

22 THE COURT: That's your position.

23 MS. KOVSKY-APAP: You went through some questions
24 with Mr. Koenig about constructive trust and if Your Honor
25 will indulge me, I'd like to respond to some of those.

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1 THE COURT: Go ahead.

2 MS. KOVSKY-APAP: You asked whether there was a
3 fiduciary or confidential relationship. I do want to point
4 out that under New York law, and this is the New York Court
5 of Appeals, that stated a person wrongfully acquiring
6 property can be treated as a constructive trustee
7 notwithstanding the lack --

8 THE COURT: They didn't wrongfully --

9 MS. KOVSKY-APAP: -- fiduciary relationship.

10 THE COURT: -- acquire the property. Your --

11 MS. KOVSKY-APAP: They wrongfully kept the
12 property.

13 THE COURT: They didn't wrongfully acquire the
14 property.

15 MS. KOVSKY-APAP: Well, they acquired it in the
16 first instance, but after it was returned to the customers -
17 -

18 THE COURT: It wasn't returned to the customers.

19 MS. KOVSKY-APAP: It was returned to the
20 customers, Your Honor, when it was transferred out of Earn
21 and into the Withhold accounts. That's the Debtors' --

22 THE COURT: Well, that's an issue that the Court
23 has to decided. Was it --

24 MS. KOVSKY-APAP: Right.

25 THE COURT: Did that -- you know, the Committee

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1 says you have to focus on when it's repaid. Absent
2 repayment, it hasn't gone back to the customer.

3 MS. KOVSKY-APAP: Well, the Debtors' position --

4 THE COURT: That was, I think one of her points.

5 MS. KOVSKY-APAP: That was one of the Committee's
6 points, but the Debtors point --

7 THE COURT: No, the Committee is a party in
8 interest and has a very strong stake in the decision. I'm
9 not going to disregard the Committee's argument.

10 MS. KOVSKY-APAP: I'm not suggesting that you
11 disregard the Committee's argument, but I am suggesting that
12 it's important to look at what the actual parties to the
13 contract are saying.

14 THE COURT: I've been reading it.

15 MS. KOVSKY-APAP: And what the Debtors said from
16 the get-go was transferring coins on the ledger. Remember,
17 this was not a blockchain transfer but transferring assets
18 out of Earn and into Custody or Withhold extinguished the
19 Debtor's contractual obligation to return those coins to the
20 customers.

21 THE COURT: And Ms. Amulic points to Section 11 on
22 the withdrawals.

23 MS. KOVSKY-APAP: And Section --

24 THE COURT: Look, I'm not saying I'm accepting the
25 argument. But her argument is that under Section 11, until

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1 it's repaid, it remains property of the Debtor. Ms. Amulic
2 is that your -- that's your position?

3 MS. AMULIC: That's right, Your Honor.

4 THE COURT: Okay.

5 MS. KOVSKY-APAP: And my position is, these terms
6 of use completely omitted any mention of Withhold.

7 THE COURT: They did.

8 MS. KOVSKY-APAP: And Withhold is very comparable
9 to a Custody account.

10 THE COURT: Maybe.

11 MS. KOVSKY-APAP: It was the default account that
12 the Debtors set up. They set up their architecture in this
13 way. They could have left it so that if you want to --

14 THE COURT: No man's land because it's not
15 expressly covered in the terms of use. Each of you argue
16 about well, read this other section and it ought to apply to
17 Withhold as well, maybe.

18 MS. KOVSKY-APAP: Look, the Debtors could have --

19 THE COURT: I understand this argument, okay.

20 They did.

21 MS. KOVSKY-APAP: Well, yeah, they didn't. My
22 point about the way that Debtors set up their architecture
23 of the platform, they could have left it. So if you're in a
24 prohibited state, you stay in Earn until you actually
25 transfer to an external wallet.

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1 THE COURT: Right.

2 MS. KOVSKY-APAP: They chose not to do that.

3 THE COURT: They did what's in here. When I say
4 "here," is the Terms of Use Version 8.

5 MS. KOVSKY-APAP: They did what's here in the
6 terms of use version, but --

7 THE COURT: What's your next argument.

8 MS. KOVSKY-APAP: So going back to responding to
9 the questions that Your Honor had raised about constructive
10 trust, Mr. Koenig argued reliance on -- there was no
11 reliance because factually --

12 THE COURT: Did you have to know about it in order
13 to rely on?

14 MS. KOVSKY-APAP: I don't know that you even have
15 to reach that issue, Your Honor, because Mr. Koenig's
16 statement of the facts was incorrect.

17 THE COURT: I'm sorry, I missed that last
18 statement --

19 MS. KOVSKY-APAP: I don't know that you have to
20 reach the issue of whether you can rely on it without
21 knowledge because as a factual matter my clients did have
22 knowledge.

23 THE COURT: That it went into Withhold?

24 MS. KOVSKY-APAP: Yes. And that's stated in their
25 declarations. They absolutely knew about it and in terms of

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1 what they relied on, they relied on the fact that the terms
2 of use said that they were only granting title to the Debtor
3 while they were in Earn, not beyond that. Mr. Koenig also
4 said that the Debtors didn't act -- do anything that was
5 unjust. They didn't do anything wrong. They were just
6 trying to handle this huge volume of withdrawals as best
7 they could.

8 I think that's also factually incorrect. The
9 Debtors did do something wrong. They were operating in
10 states where they weren't licensed to do so. They created
11 an architecture --

12 THE COURT: No, no, no, no, no, no. They weren't
13 operating in states they weren't licensed to do so. They
14 weren't licensed to have Custody accounts in nine states.

15 MS. KOVSKY-APAP: They weren't -- it was beyond
16 not having Custody accounts. They weren't licensed to hold
17 cryptocurrency on behalf of customers, whether you call that
18 Custody or whatever you want to call it, but that's exactly
19 what they did. They allowed customers to transfer out of
20 Earn where they said -- and if you look at all of their
21 prior pleadings, they said we were holding these coins on
22 behalf of the customers.

23 They were doing that in states they weren't
24 entitled to do so and they were preventing those customers
25 for a month before the bankruptcy filed, prevented those

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1 customers from withdrawing their assets off of the platform,
2 even though they had already exited the Earn program.

3 THE COURT: Okay. Next point.

4 MS. KOVSKY-APAP: The Committee says that there's
5 no meaningful difference between assets that customers
6 attempted to withdraw and assets that customers actually
7 transferred out of Earn to Withhold just because those
8 customers happen to live in prohibited states. I think the
9 Committee gets it backwards. There's no meaningful
10 difference between customers who transferred coins to
11 Withhold and customers who transferred coins to Custody.

12 In both cases, they exited the Earn program. They
13 exited that contractual relationship. In terms of looking
14 at what was the Debtors' intent about that, look at what Mr.
15 Nash argued on Monday to Your Honor. In order to have a
16 contract, you have to have offer, acceptance, and
17 consideration.

18 The four corners of the contract make it clear
19 that the consideration for the grant of right and title that
20 the customers were giving to Celsius while they were in the
21 program, it was the rewards they were earning. It was the
22 interest. Mr. Nash made that point himself. He said that
23 that was -- and I have this exact words here somewhere --

24 THE COURT: You don't dispute that in the first
25 instance --

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1 MS. KOVSKY-APAP: But --

2 THE COURT: -- your clients entered into a
3 contract with Celsius as reflected in Version 11 of the
4 terms of use --

5 MS. KOVSKY-APAP: Version 8, Your Honor.

6 THE COURT: Version 8. Excuse me. Version 8 of
7 the terms of use. You're not disputing that.

8 MS. KOVSKY-APAP: I'm not disputing that they
9 entered into a contract. Correct, Your Honor. And the
10 consideration with respect to the Earn program, that was the
11 contract that they had entered into. They put coins in Earn
12 and the consideration that supported that grant -- and it's
13 spelled out in the terms of use themselves. If you look at
14 Section 13, "In consideration for the rewards payable to you
15 on the eligible digital assets using the Earn service."
16 That's what you're granting your right and title to Celsius
17 for. That's the quid pro quo.

18 THE COURT: Well, you know, people enter into
19 contracts and sometimes they breach it. That doesn't
20 abrogate the contract. It may give somebody a claim for
21 breach of contract.

22 MS. KOVSKY-APAP: But it wasn't --

23 THE COURT: It doesn't -- you know, Celsius' title
24 to the assets doesn't vanish into thin air because they
25 breached a contract.

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1 MS. KOVSKY-APAP: Your Honor, it wasn't a breach
2 of contract. I'm saying following the terms of the contract
3 itself, consistent, compliant with the terms of the
4 contract.

5 THE COURT: Well, there's no -- there's nothing in
6 the contract about Withhold accounts, so I mean, that's just
7 --

8 MS. KOVSKY-APAP: No, it's not about Withhold
9 account, but there's plenty about Earn accounts and it tells
10 you when and to what extent you're granting right and title.
11 And that's the intent of the parties as reflected within the
12 four corners of the document.

13 THE COURT: Any other arguments?

14 MS. KOVSKY-APAP: New York.

15 THE COURT: All right. We're going to take a
16 recess until two o'clock and we're going to come back and
17 we're going to talk about preference. And I want to put a
18 question that I want you all to address.

19 Could the Debtors, while -- this really goes to
20 the Custody account holders who filed an adversary
21 proceeding. Could the Debtors file a counterclaim for
22 preference recovery? And if so, does Federal Rule of
23 Bankruptcy Procedure 7054 (indiscernible) 54 -- well, hang
24 on. Rule 54(b).

25 "When an action presents more than one claim for

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1 relief, whether as a claim, counterclaim, cross claim, or
2 third party claim, when multiple parties are involved the
3 Court may direct entry of a final judgment as to one or more
4 but fewer than all claims or parties only if the Court
5 expressly determines that there is no just reason for
6 delay." It goes on from there.

7 So if Celsius or if the Committee were granted
8 standing to do so filed preference avoidance claims against
9 the Custody account holders, would it then be clear that
10 only if there is no just reason for -- I (audio drops) your
11 partial judgment in favor of the Custody account holders
12 because I conclude yeah, it belongs (audio drops). I'd have
13 to, I could wait and resolve the preference avoidance claim
14 before doing so.

15 So the only thing, you've stipulated that there's
16 no prejudice for the Debtors not having asserted the
17 preference claim at this point. So isn't the result that
18 you've got to wait for the Court to resolve the preference
19 issues? Anyway, I'd just like you to address that when we
20 come back. So we're in recess until two o'clock.

21 CLERK: Judge? Judge?

22 THE COURT: Yes.

23 CLERK: Sorry. There's a party who has their hand
24 up, Arshley --

25 THE COURT: No, we're taking a recess now. We're

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1 coming back at two o'clock.

2 CLERK: Okay. Thank you, Judge.

3 (Recess)

4 THE COURT: All right, please be seated. When we
5 broke for lunch, there was someone appearing by Zoom who
6 wanted to be heard, and Deanna, is that person still online
7 and wishes to be heard.

8 CLERK: No one's raising their hands. The party
9 that tried to speak before, can you please raise your hand
10 again?

11 THE COURT: All right, we'll go on. And if --
12 Deanna, if someone wants to be heard on what we were talking
13 about, the issues from this morning, I'll certainly hear
14 them but at an appropriate time. Okay --

15 CLERK: Thank you.

16 THE COURT: So let's move forward with the
17 questions of should -- well, let me say this. There is no
18 dispute with respect to title for the Custody account
19 holders. There's agreement by the Debtors, the Committee,
20 and the Ad Hoc Custody Account Holders Group that title to
21 crypto assets pass to the Custody account holders when
22 assets were deposited in the Custody accounts on or after
23 April 15th, which is 89 days or less from the petition date
24 and therefore raises the preference issues.

25 So in the joint stipulation that the parties

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1 entered, it's ECF Docket No. 1044, under phase one, it
2 described "Two threshold legal issues for briefing in phase
3 one are as follows." First bullet point, "Whether assets in
4 the Custody and Withhold accounts are property of the
5 Debtors' estates, including whether the terms of use are
6 unambiguous on the issue of ownership of such assets." And
7 as to that point, there is no dispute as to the Custody
8 account holders. There remains a dispute as to the withhold
9 account holders.

10 And then the second bullet point is, "If the
11 assets are not property of the Debtors' estates, whether the
12 Debtor should nonetheless be allowed to continue to hold
13 those assets and maintain the status quo with respect to
14 individuals and/or accounts where the Debtors have
15 potentially viable claims, including without limitation
16 preference claims."

17 So I think that clearly is a right of the account
18 holders. There may still be issues about allocating
19 shortfall for Custody account holders. The -- that same
20 stipulation, 1044, in Paragraph 9 provided that during phase
21 one, the parties agree that, first bullet point, "All
22 inferences regarding the existence, validity, and merit of
23 preference or other claims against the Custody and Withhold
24 claimants will be drawn in favor of the Debtors' estates."

25 The second bullet point, "The absence of a pending

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1 action for preference or other claims against the Custody
2 and Withhold claimants will not constitute either a basis
3 for the Court to rule in the Ad Hoc Group's favor or waiver
4 by the Debtors' estates of the right or any party asserting
5 rights on behalf of the estates, including without
6 limitation the Debtors, the Committee, or a trust to bring
7 such claims."

8 And then the third bullet point was "The Court
9 will not be asked to adjudicate the rights of any of the
10 Debtors or other -- of the Debtors' other customers as part
11 of phase one and for avoidance of doubt, the rights of Earn
12 and Borrow customers are fully reserved."

13 So, we need to go on and discuss this issue of
14 whether the Custody account holders should -- it should
15 await phase two, issue that I raised at the end of this
16 morning's hearing about the impact of Federal Civil
17 Procedure 54(b) (audio drops) -- 54 which, so I want that
18 addressed as well.

19 So, Mr. Ortiz, are you going to begin? You want
20 the money back, the assets back, now rather than later.

21 MR. ORTIZ: Good afternoon, Your Honor. Kyle
22 Ortiz of Togut Segal and Segal on behalf of the Ad Hoc Group
23 of Custodial Account Holders. So we're going to leave the
24 happy world of our 100 percent or 94 percent agreement and
25 despite agreeing on title, we are, I think at a 0 percent

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1 agreement on what that means, Your Honor.

2 And I've been thinking a lot as, I'm sure the
3 other parties have, about how to bring clarity to what is a
4 very kind of muddled picture today. And I think the way to
5 do that is to really talk about what the parties have to
6 start with, because we really, Your Honor, have two sets of
7 assets that we've been talking about.

8 Not talking about Withhold, I'm just talking about
9 within the Custody universe, there's two sets of assets that
10 have been in a sense kind of mashed together and I think
11 it's important to pull them apart because doing so helps
12 demonstrate the legal entitlements and I think will provide
13 context for this conversation.

14 So one set of assets we have is the actual digital
15 assets in a Custody service that all parties agree is
16 property of the Custody service users and not property of
17 the estate. And then, separately, we have preference
18 actions which are very clearly property of the estate. The
19 estate owns those and they have owned those since the
20 petition date.

21 And that's a very critical distinction, Your
22 Honor, because it highlights where -- what the code provides
23 and what it doesn't and what the property rights were on the
24 petition date. And when I kind of step back to first
25 principles, property rights as we all know, are defined by

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1 state law unless the code specifically provides for some
2 greater right. That's the Butner principle. Might have
3 been the very first thing I learned in law school.

4 And when we put that through the lens of what the
5 code brings in and what it doesn't, and how the Second
6 Circuit has interpreted that in Colonial Realty saying, you
7 know, you get this relatively broad estate under 541(a)(1)
8 which unquestionably also includes the preference actions,
9 but you don't get the proceeds on those actions until they
10 recovered under 541(a)(3).

11 And there's nothing in the code or in state law
12 that elevates the right they do have on the petition date,
13 preference actions, to expand to something they do not have
14 on the petition date which is title to this property. I'd
15 note, Your Honor, the code also does not provide for any
16 right to reduce collection risk or the right to reduce the
17 cost of monetizing assets that are the Debtors such as the
18 preference actions.

19 What the Debtors and the Committee are asking the
20 Court to do is stretch the code. They're asking you to
21 permit them a greater property right than they have and to
22 hold property --

23 THE COURT: No, I don't think so. I mean, the --
24 the Debtors and the Committee acknowledge that 89 days
25 before the bankruptcy, title to the assets transferred to

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1 the account holders, transferred from the Debtors to the
2 account holders. But they also say because it's 89 days on
3 the face of it, it gives rise to potential preference
4 actions. And so let me ask you this. Looking at Federal
5 Rule of Civil Procedure 13, Compulsory -- A, Compulsory
6 Counterclaim, do you agree that preference avoidance is a
7 compulsory counterclaim to the claim asserted by the Custody
8 account holders?

9 Yeah, this was transferred to us. You agree it
10 was transferred to us, but it happens to be 89 days and, you
11 know, Rule 13(a)(1)(A) so first, you know, (a)(1), "A
12 pleading must state as a counterclaim any claim that at the
13 time of its service the pleader has against an opposing
14 party if the claim, A, arises out of the transaction or
15 occurrence that is the subject matter of the opposing
16 party's claim; and B, does not require adding another party
17 over whom the court cannot acquire jurisdiction."

18 So this seems to me to have all -- the preference
19 claim has, appears to me, to have all of the earmarks,
20 characteristics of a compulsory counterclaim that would have
21 to be asserted as a counterclaim to the adversary complaint
22 that you filed. You filed an adversary complaint, said it's
23 ours and it arises -- arising out of that same transaction
24 or occurrence.

25 They say, aha, it's yours, but it's subject to

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1 avoidance and you know, the parties entered into a
2 stipulation. No one including me was particularly anxious
3 at this stage to see a compulsory counterclaim of avoidable
4 preference and have to deal with that as well at this stage.
5 Indeed, in the somewhat unusual circumstances here, it
6 essentially was agreed, well, you have a phase two where you
7 could deal with the -- there may be defenses that -- to
8 preference.

9 And so I -- when I read 7054 and I read Rule 13,
10 you know, would you rather that the Debtor or the Committees
11 tomorrow file a compulsory counterclaim against all of your
12 clients for an avoidable preference? I mean, I thought that
13 the -- I'm not advocating that, okay, and what I'm saying is
14 it seems to me that the stipulation which dealt with, okay,
15 what (indiscernible) move to phase two really was a way of,
16 let's try and deal with this issue now. Let's see if we can
17 find that there are -- what are the defenses to preference,
18 et cetera.

19 And look, you know, so many of the cases I've had,
20 I'm not -- no reason to think this is going to get there --
21 you know, there's a reorganization plan where a term of the
22 plan is, particularly if it's a sale and there's another
23 buyer who wants to run the business, they agree they'll wave
24 preference claims. Okay.

25 I don't know whether that will happen or not, but

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1 are you going to force the issue that the Debtor or the
2 Committee has to seek substitute standing, you know, STN
3 standing to file preference claims? Are they going to file
4 it as a not only -- well, a class act, defendant class
5 action, so they name every Custody account holder, not just
6 the members of your Ad Hoc Committee or -- I don't think
7 that -- even just naming the members of your Ad Hoc
8 Committee - that's where I am.

9 I mean, look, I -- when this first came up, it's
10 no secret, I expressed the unstudied view really, you expect
11 me to return \$200 million was the number people were
12 bandying about at that time to some large number of Custody
13 holders and basically saying to the Debtors or to the
14 Committee or a litigation trust, you find them, you sue
15 them, you try to collect later on. Well, you filed an
16 adversary proceeding and it does seem to me to be a
17 compulsory counterclaim.

18 MR. ORTIZ: Thank you, Your Honor. So a couple
19 responses to that, Your Honor. I think in the first
20 instance, there -- we filed an adversary proceeding in
21 response to kind of running out of time to continue to wait
22 for the Debtors, but the purpose of that was to just
23 establish that as of the petition date, it was property of
24 the estate. They filed a motion that provided for certain
25 of those assets to be returned to certain people in

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1 different buckets.

2 And a lot of what we were trying to respond to was
3 to say in that motion, it should say that this is not
4 property of the state. There was a declaratory judgment
5 that it's not property the estate, so they're not
6 disagreeing with that. So what --

7 THE COURT: I'm not disagreeing, either. You
8 filed the adversary proceeding. The consequence of that is,
9 if forced to do so, somebody is going to file a preference
10 avoidance counterclaim and I'm not going to decide the
11 issue. You get \$200 million back now and later on, somebody
12 can decide whether they can chase however number of people
13 there are to try and recover the preference avoidance.

14 I don't have to do -- under Rule 54(b), I don't
15 have to do that. Okay. We don't have the counterclaim, but
16 you didn't want the counterclaim and you entered into a
17 stipulation that says, you know, all inferences are drawn in
18 favor of the Debtors and the absence of a pending action for
19 preference or other claims will not constitute the basis for
20 the Court to rule in your favor or not.

21 So that's basically -- you know, you get in issues
22 about injunctions and everything else. It doesn't seem to
23 me to be that. This is a compulsory counterclaim.

24 MR. ORTIZ: No, I --

25 THE COURT: Well, let me -- do you agree it would

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1 be a compulsory counterclaim?

2 MR. ORTIZ: I don't like disagreeing with judges.

3 I want to find a way to say I would --

4 THE COURT: No, you can disagree with me.

5 MR. ORTIZ: -- agree. No, but I think the issue,
6 Your Honor --

7 THE COURT: It's quite all right.

8 MR. ORTIZ: -- is that the -- I don't think it's a
9 compulsory counterclaim to who had title. It is a
10 compulsory counterclaim to --

11 THE COURT: It is to getting it back.

12 MR. ORTIZ: Yes, Your Honor.

13 THE COURT: So you don't want it back?

14 MR. ORTIZ: Not through that adversary proceeding.
15 I think the purpose was to get --

16 THE COURT: You don't want it back?

17 MR. ORTIZ: We do want it back, but --

18 THE COURT: You don't want it back -- do you want
19 it back now?

20 MR. ORTIZ: We do want it back now, Your Honor.

21 THE COURT: Well, that raises this whole issue of
22 the compulsory counterclaim and the Court adjudicating it
23 all at the same time, not entering judgment until the issue
24 about -- because look, how much the Custody holders get back
25 is going to be determined in large measure by a resolution

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1 of the preference issue. I don't know.

2 MR. ORTIZ: I --

3 THE COURT: I'm not saying what the resolution of
4 that is.

5 MR. ORTIZ: Your Honor --

6 THE COURT: Largely going to be determined by
7 that.

8 MR. ORTIZ: A couple of responses to that. I do
9 think that there is no question that all of these users have
10 preference exposure. They do. And as you note, we don't
11 know that that will ever be brought. And I should note that
12 this isn't -- there's 58,000 people that are in the Custody
13 program. That is 200 million. There are billions. I don't
14 know the exact number. I don't know off the top of my head,
15 but it's like two or three billion of people who got --

16 THE COURT: Like 300,000 account holders.

17 MR. ORTIZ: No, no, I'm not talking about account
18 holders, Your Honor. I'm talking about people who got off
19 in the 90-day window. So there are people who between when
20 Custody existed and between 90 days and when the pause
21 happened actually got off the platform and that's a number
22 in the billions, but --

23 THE COURT: That's the statute.

24 MR. ORTIZ: That's the statute, Your Honor.

25 THE COURT: Unless they were insiders.

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1 MR. ORTIZ: But all those people have that same
2 risk, and I think that the point that we're trying to make
3 is not only do we not know if they'll ever bring
4 preferences, but we don't know if they'll bring preferences
5 for in-kind, what was transferred, or if they'll bring for
6 the value that's transferred and that that matters, Your
7 Honor, because this is not just dollars sitting in an
8 account.

9 We keep talking about dollars but it's not. It's
10 coins, the value of which is changing on a daily basis. And
11 if they choose to bring dollarized claims against folks and
12 they didn't have access to their own property and they
13 didn't have the freedom to use their property to potentially
14 get out of crypto if that's what they want to do and put it
15 in an interest bearing account, if the Debtors come back
16 looking for dollarized claims or if there's just real harm
17 for real live people versus what I think really amounts to,
18 is there a collection risk and, you know, if we're going to
19 say that there -- I don't think we addressed the compulsory
20 issue and we could potentially brief that, but if we're
21 going to --

22 THE COURT: It sure looks like it arises out of
23 the transaction or occurrence that is the subject matter of
24 the opposing party's claim. Do you have any argument that
25 it's not? And you know --

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1 MR. ORTIZ: Well --

2 THE COURT: And if not, it's -- look, if it's not
3 compulsory it's permissive and for sure I'm going to let
4 them assert the permissive counterclaim. I think it's
5 compulsory, but I don't have to decide that. And Rule
6 54(b), it doesn't hinge on whether it's compulsory
7 counterclaim, permissive counterclaim.

8 You know, Mr. Ortiz, in Motors Liquidation when I
9 took it over from Judge Gerber and there was the avoidance
10 action about the messed up repayment to 500 financial
11 institutions of a loan that was mistaken, where the
12 collateral was mistakenly released, they were repaid, okay.
13 It was a headache to deal with 500 and it was streamlined
14 that the parties agreed, okay, who would participate in the
15 adversary proceeding and it was tried and decided.

16 It wasn't 50,000. And it is certainly -- it's
17 unappealing to me and I would think to all of you out there
18 to say that 50,000 people are going to be dragged in and
19 named as a defendant in a preference avoidance action that
20 may never have to be brought. That's really -- we don't
21 know.

22 MR. ORTIZ: Right. I think the issue, Your Honor,
23 is again, I come back to the fact that this is not something
24 that just sits idle, that the time impacts the actual users
25 and you have things like, you know, if they want to bring --

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1 even if it's compulsory counterclaim, there are things like
2 orders of attachment. I mean, this is a lot of funds and it
3 lost 40 percent of its value between the petition date and
4 now, and that's significant value that could be -- that
5 folks could continue to lose, and if they ultimately decide
6 at the end of the day, we aren't going to bring a preference
7 action and these people get back something that's worth --

8 THE COURT: Okay, I want the answer to the
9 question. Is it a compulsory counterclaim? You got the
10 code in front of you? You have the rules in front of you?
11 Do you have any doubt?

12 MR. ORTIZ: I -- unfortunately, Your Honor, I do
13 have a little bit of doubt just because of what we were
14 seeking. And I'm not trying to be difficult, Your Honor.
15 I'm really not.

16 THE COURT: You were seeking a determination that
17 it's owned by your clients and they want the assets now. If
18 you stipulate on the record that all you want is a
19 determination that they own the assets and you're not
20 pressing for a return of the assets until the issues are all
21 resolved, tell me that now, too. I mean, I -- look, Mr.
22 Ortiz I'm not -- I really don't want to give you -- not
23 trying to give you a hard time.

24 MR. ORTIZ: No, I know you aren't, Your Honor.

25 THE COURT: But what -- look. I really think that

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1 the stipulation that you all worked out, the procedures,
2 made enormous sense. Whether at the end of the day, that's
3 going to really get all the issues resolved or not, but it
4 tried to come up with a way that isn't going to bury people
5 in discovery forever and is going to try and sort of
6 crystallize the issues about it and you want to jump start
7 that, you want the assets now rather than a -- after phase
8 two. I don't know whether you get it after phase two.

9 You might. I don't -- you know, you might have
10 some very good arguments as to why they're not avoidable
11 preferences. I don't know. I'm not drawing any conclusions
12 about that at all.

13 MR. ORTIZ: I understand, Your Honor. I mean --

14 THE COURT: I marveled at the start when I saw 89
15 days. How did that happen? But you know, I think at some
16 hearing I said that's how Baldwin-United came about. There,
17 it was because of the workout agreement where they gave
18 security to previously unsecured creditors. And you know,
19 the unsecureds were afraid if it goes 90 days, they're going
20 to have perfected security interest in most of the assets
21 and so they filed involuntary 89 days.

22 That's not how -- here the Debtors filed 89 days.
23 You know, I'm sure you wish it was 91 days.

24 MR. ORTIZ: Yeah, although I'm not sure that would
25 matter. I think the 89 days was the beginning of the

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1 program. There's lots of people who would have had
2 transfers after that. I'll note that the very beginning of
3 my career was being pulled out of an orientation to help
4 work on Lehman and seeing the masters of the universe
5 throwing up in garbage cans. So I don't believe in
6 conspiracy theories, because I just don't think there's
7 people that are smart enough, particularly when you're
8 dealing with an issue where things are falling apart.

9 But I do, I think we -- look, if we had the
10 opportunity to brief the issue, and I don't want to slow
11 down this process --

12 THE COURT: Would it make a difference? I mean,
13 look. Because if it isn't compulsory, it's permissive and
14 the same result could apply. Rule 54(b), 7054(b), doesn't
15 hinge on whether the counterclaim is permissive or
16 compulsive -- compulsory.

17 MR. ORTIZ: Okay. Well, so I guess if we're going
18 to say it doesn't matter if it's compulsive or permissive
19 and that's where we're going, we'll just, we'll speak from
20 that place.

21 THE COURT: If you disagree with that, go ahead
22 and tell me. Sometimes I get things wrong, you know.

23 MR. ORTIZ: No, Your Honor. I'm not going to
24 disagree with that at the moment. But I think, you know,
25 some of the things, I still think there needs to be some

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1 level of protection for these claimants, even if you're
2 saying we need to go through a phase two, and that's the
3 problem --

4 THE COURT: You want them to liquidate all of the
5 crypto assets that are in Custody accounts?

6 MR. ORTIZ: Liquidate them all?

7 THE COURT: Yeah.

8 MR. ORTIZ: But they're not the Debtors' to
9 liquidate at the moment.

10 THE COURT: Well, you're saying you're afraid it's
11 going to depreciate in value.

12 MR. ORTIZ: I'm not --

13 THE COURT: You want to reach an agreement that
14 that provides that they'll sell it all in the ordinary, you
15 know, in an orderly fashion to try and -- most of the
16 creditors, the last thing they wanted was to be repaid in
17 fiat.

18 MR. ORTIZ: No, I understand that, Your Honor. I
19 think that the issue is, we may have agreed to something of
20 that sort in July, it was a very different market value.
21 But most of the creditors -- and I don't consider our
22 clients creditors at the moment -- but most of the people,
23 they are true believers. I'll acknowledge that a lot of
24 them want it back, but they might not want it back to use it
25 in the particular way that the Debtors were going to use it.

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1 They -- and we shouldn't speculate on what they --

2 THE COURT: The Debtors aren't using it now.

3 MR. ORTIZ: They're not using it, but I think,
4 look, the -- part of the rights you have as a property
5 owner, as the title owner of a property is to do with it
6 what you will. And when you're restricted from that ability

7 --

8 THE COURT: Unless you're a preference defendant
9 and the Court, you know, compulsive or permissive, I think
10 it's compulsory counterclaim, is going to, okay, I'm not
11 putting you off forever.

12 MR. ORTIZ: I mean, the time matters and I
13 understand --

14 THE COURT: I've been bending over backwards to
15 try and get these issues resolved. --

16 MR. ORTIZ: You know, and look, I appreciate that
17 we've put this on a somewhat expedited schedule to try to
18 make that all happen, but when we're looking at holding
19 something pending an action involving it, there needs to be
20 --

21 THE COURT: Persuade me what legal principles say
22 you should get the money back now. When I say money, get
23 the crypto assets back now.

24 MR. ORTIZ: Well, we don't necessarily --

25 THE COURT: In light of the stipulation that you

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1 signed, Paragraph 9, you know, what is it that you're
2 saying, what legal principle requires that the Court order
3 that the assets be returned to the Custody account holders?

4 MR. ORTIZ: Well, I think that the issue on that
5 and -- know judges hate when people say respectfully because
6 it's --

7 THE COURT: Oh, just --

8 MR. ORTIZ: -- but Your Honor, I don't think -- I
9 think that's actually, I hate to say flipping on its head
10 because there was a burden that we had, which was to show
11 title. That's been agreed. Burden then is on them to show
12 a basis to hold it.

13 THE COURT: And if they filed the counterclaim --
14 look --

15 MR. ORTIZ: But even if they filed a
16 counterclaims, Your Honor --

17 THE COURT: It's not -- you don't -- look. You're
18 not contending that the assertion of a preference claim
19 would be in bad faith.

20 MR. ORTIZ: No, Your Honor, of course not.

21 THE COURT: Okay.

22 MR. ORTIZ: But I am asserting that they don't get
23 title to it and the ability to hold it and enjoy it and do
24 with it what they will until there is a recovery on that
25 preference claim. That's what Colonial Realty said under

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1 541(a)(3) versus 541(a)(4), and I know what the concern is,
2 Your Honor. I completely understand --

3 THE COURT: But 54(b) makes clear that I
4 adjudicate -- I can, I probably should in these
5 circumstances, adjudicate them together.

6 MR. ORTIZ: But even if we're adjudicating them
7 together, during that time, they don't hold title.

8 THE COURT: They're not using it.

9 MR. ORTIZ: They're preventing the title owners
10 from using it and enjoying their property and --

11 THE COURT: Okay.

12 MR. ORTIZ: -- deciding --

13 THE COURT: It's in dispute, okay, and as to one
14 of the claims, you've come to an agreement with the
15 Committee and the Debtors about title. Okay. So, but I
16 come back to 54(b). "When an action presents more than one
17 claim for relief, whether as a claim, counterclaim, cross
18 claim, or third party claim or when multiple parties are
19 involved, the Court may direct entry of a final judgment as
20 to one or more, but fewer than all claims or parties only if
21 the Court expressly determines there is no just reason for
22 delay."

23 And the just reason -- the no just reason for
24 delay here is that good luck, litigation trust or Committee
25 or Debtors chasing 50,000 people, entities to recover

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1 preferences. That's -- you know, there is a just reason for
2 delay. Okay? And look, there's no question. Nobody's
3 filed a counterclaim, but you essentially negotiated for
4 them not to do that at this stage, and you set out
5 procedures to follow for phase two, including, you know,
6 selecting -- I won't go through the whole thing. This is
7 Paragraph 10 of that ECF 1044. You know, paragraph -- "To
8 the extent necessary and depending on the Court's ruling on
9 the phase one issues, the parties shall further brief the
10 Custody and Withhold issues in phase two as set forth
11 herein." And you had a schedule for doing that.

12 MR. ORTIZ: I understand that Your Honor, but I
13 think the issue is that --

14 THE COURT: Maybe more than I bargained for, no
15 later than 60 day -- calendar days after the filing of the
16 preference defense motion the Court's supposed to have a
17 hearing. It is not getting put off for years.

18 MR. ORTIZ: I'm not saying that, Your Honor, and I
19 think even if you're going to -- if you look at Rule 13 and
20 you look at, you know, Rule 54(b) which I really looked at
21 as more designed to prevent piecemeal appeals, but I think
22 the important thing there is that gets to final judgment.
23 It doesn't get to who today has the right to hold the
24 property. They -- everyone agrees --

25 THE COURT: They agree that your clients have the

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1 right to hold the property, but they don't want to give it
2 back until the preference issue is resolved because there is
3 a good faith basis to believe that the transfers 89 days
4 before bankruptcy are voidable.

5 MR. ORTIZ: I appreciate that, Your Honor, but I
6 think the issue is that that's what they're trying to
7 accomplish. That gets to -- if we all agree to title and
8 they want to say that there is also this preference action,
9 that essentially amounts to an injunction preventing these
10 people from having their property.

11 THE COURT: Do you want --

12 MR. ORTIZ: I think it's important --

13 THE COURT: Do you want to force the Debtors or
14 the Committee if they get STN standing to file a preference
15 action against your clients? Is that what you want? You
16 know, if you're insisting, I'll think about it. I don't
17 think I have to under the terms of the stipulation, but is
18 that what you really want or do you want to proceed in the
19 orderly fashion that the stipulation provided?

20 MR. ORTIZ: I don't necessarily want preference
21 actions brought against our clients, but I do think that if
22 people are in -- while that is all waiting, being deprived
23 of their property, which is, you know, a very high burden
24 and -- I'm going to step back, Your Honor, just one second.
25 When we were talking in the 107 context about privacy and

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1 the U.S. Trustee made a point that I thought you liked,
2 which was you really need to show evidence for each person.

3 What we're talking about is there being a
4 potential risk of collection, but there's no evidence that
5 they'll have difficulty with these people other than the
6 quantity and like everybody would have to submit to the
7 jurisdiction of the Court and it would just put them on the
8 same plain as the people who --

9 THE COURT: How many clients are on your
10 committee?

11 MR. ORTIZ: On our committee? It's about 70 right
12 now, 70 or 80.

13 THE COURT: You know, Mr. Ortiz, it's the
14 combination of the stipulation that you entered into; the
15 requirements of Rule 13 on counterclaims, which I think here
16 is a compulsory counterclaim, but really almost doesn't
17 matter whether it's permissive, compulsory; and 54(b),
18 7054(b) that if -- that I don't have to make them file, I
19 don't have to put them to the test and say look, you either
20 filed a counterclaim or I'm going to order the funds given
21 back.

22 I think the stipulation that you entered into
23 allows me to continue, I'll call it the pause, and it's not
24 the same pause that Celsius put, that will go forward on the
25 schedule. I don't know. I mean, I'm sure -- I don't want,

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1 you don't need to do it now. It's defenses to the
2 preference claim.

3 MR. ORTIZ: Yeah, there -- look, clearly there's
4 defenses, but that doesn't change what Your Honor is saying,
5 whether it being permissive or mandatory that they have,
6 they can bring that. I just, I'm going to take a slightly
7 different approach, Your Honor, and again, I get back to
8 what I essentially think if everyone's agreeing that there's
9 title, what the Debtors are essentially saying is that
10 because they have these preference actions and if you allow
11 the non-estate assets to leave, there's going to be a
12 potential cost to collecting them which might devalue
13 something that the Debtors do have.

14 They own preference actions. Under no
15 circumstance deny that and the risk is if we let these
16 people go, it devalues that because you have to go find them
17 again. And I think Your Honor actually addressed this issue
18 once before in a different context, in ResCap in the Invest
19 Vegas case where there was a lift stay in connection with
20 selling certain HOA rights that there was a junior lien that
21 the Debtors had and the main --

22 THE COURT: -- that a law about priorities? Is
23 that --

24 MR. ORTIZ: No, Your Honor, so --

25 THE COURT: -- recollection.

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1 MR. ORTIZ: So what -- to just kind of refresh
2 your recollection --

3 THE COURT: Please don't.

4 MR. ORTIZ: Okay, I won't but the point there,
5 Your Honor, was that something that --

6 THE COURT: You know, I kind of -- this is-- I'm
7 interrupting. During -- ResCap was filed in 2012. During
8 the course of that case, I decided law of 26 different
9 states, in written opinions. I don't want to have to do
10 that again.

11 MR. ORTIZ: The only point I'm going to make on
12 that is that what the defendant said, there was the
13 protection to the automatic stay extend to protect value of
14 the property of the Debtors' estate, and you ruled that that
15 is not the case. If you don't own the property, even if
16 selling it will result in something that changes the value
17 of property, which in this case would be the preference
18 actions, that's not enough to say that there was, in that
19 case, a violation of the stay. So I think there's some --

20 THE COURT: --- the automatic stay. I mean, this
21 is, as I say, maybe I'm wrong. It's three things, the
22 stipulation that all inferences are in their favor around
23 the preference claim, no prejudice as a result of them not
24 having asserted it, and Rule 13 on counterclaims. I think
25 this is compulsory but even if it's permissive, you know,

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1 okay. And Rule 54(b). If it got asserted as a
2 counterclaim, I could simply decide that under 54(b), you
3 can't establish no just reason for delay in entering a
4 partial judgment.

5 And just the opposite, the just reason for the
6 delay is that I don't want anybody having to chase 50,000
7 people to recover a total of approximately, you know,
8 somewhere, whether it's 200 million today or 180 million,
9 whatever, it's a moving target because the value of crypto.

10 MR. ORTIZ: But that value of crypto matters, Your
11 Honor. These are real people with real --

12 THE COURT: Yeah, I understand that.

13 MR. ORTIZ: -- dollars that have -- the delay, and
14 again, I don't think it's --

15 THE COURT: Mr. Ortiz, you wouldn't be standing
16 before me today if I didn't understand this point about --
17 I've probably said and just -- if it's not the Debtors' and
18 it should go back to somebody else, it's got to go back
19 sooner rather than later. I agree completely. It was about
20 that point and someone says 89 days. So yeah, there are
21 preference claims. There are even good defenses to it. You
22 have a schedule. You agreed on a phase two schedule.
23 That's in Paragraph 10 of ECF 1044.

24 You know, unless you all agree to alter that
25 schedule, that's the schedule.

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1 MR. ORTIZ: Something tells me, Your Honor, with
2 where we're headed that the other parties won't be looking
3 to modify that schedule. But I don't -- the problem I'm
4 having, Your Honor, is just all of that doesn't change who
5 has possession at the moment. And they have to have a right
6 to that and that's when I get to things like (indiscernible)
7 attachment or whatever you need to compensate people for the
8 fact that they're not getting to use and enjoy their
9 property and I think there's a serious risk.

10 If I'm the Debtor -- and I'm going to be honest,
11 what I would do if I was the Debtor, if the value drops
12 significantly, I'm going to bring preference actions, if I
13 bring them, based on the value. If it goes up, I'm going to
14 bring them based on what was transferred. That's what, you
15 know, most Debtors would do. So there's a real --

16 THE COURT: There's Paragraph 3 of the
17 stipulation. "The deadline to respond to the Custody
18 complaint is adjourned pending resolution of the Custody and
19 Withhold issues." So they haven't had to file a responsive
20 pleading. If they filed a responsive pleading, I think
21 they'd have to file the counter -- the preference
22 counterclaim.

23 MR. ORTIZ: Right, Your Honor, and part of the
24 reason that was delayed is if in the context of phase one
25 and in the context of the Debtors' motion, it was determined

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1 that the property is -- the title is with the account
2 holders, there's no reason to go forward with that action
3 and then we would have done what we would have otherwise
4 talked about today and turned to --

5 THE COURT: So it says --

6 MR. ORTIZ: -- Section 19(b).

7 THE COURT: -- "is adjourned pending resolution of
8 the Custody and Withhold issues," which I view as involving
9 not just phase one but the phase two issues.

10 MR. ORTIZ: Well, I don't think that was
11 necessarily the design, Your Honor.

12 THE COURT: You don't think so?

13 MR. ORTIZ: The reason you have a phase one and
14 phase two is if you can resolve it in Phase one, you don't
15 have a phase two. Otherwise it would just been --

16 THE COURT: So if you had lost on phase one, you
17 won on Phase one. If you had lost on phase one, you
18 wouldn't have to get to phase two. You won on phase one.
19 You won by their agreeing with your position. Okay. But
20 you hadn't one on phase two.

21 MR. ORTIZ: Right. Well I mean, we won on
22 question one of phase one, Your Honor. Question two of
23 phase one was, "Does that mean they have to give it back?"
24 Okay. And our view outside of -- even if you have Rule 13
25 and Rule 54, is that they do because it's not theirs. And

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1 all of this will be adjudicated and that was the point I was
2 -- I think I was trying to make in the beginning was that
3 they don't lose a right. They don't lose a property right.

4 THE COURT: I'm not entering judgment for your
5 clients. The title is theirs. And they ought to get stuff
6 back now. (indiscernible) the notion of I hope there are
7 never preference actions. I hope the outcome of this case
8 somehow results in this issue getting resolved
9 satisfactorily to your -- to the Custody account holders. I
10 don't know whether it will or not. But for the stipulation,
11 I would tell them I'll hear your compulsory counterclaim,
12 let's go.

13 MR. ORTIZ: But then wouldn't they be put in a
14 position, Your Honor, where they have to decide now --

15 THE COURT: Yes, they have to decide now or have
16 judgment entered on your complaint that belongs to your
17 clients. And then the issue of, if that's the only thing
18 that's said, if there's no preference claims -- you know, if
19 the Debtors -- I'm sure the Committee is going to ask for
20 standing to file it if the Debtor declines to do it.

21 MR. ORTIZ: Well, I think that'll, you know,
22 depend on the outcome of various plan and sale discussions.
23 But you know, in a normal context, you have the choice that,
24 you know, it's interesting because the Debtors and the
25 Committee both point to 502(d), but that would make the

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1 people who are creditors, and I don't think --

2 THE COURT: And your position is they have title,
3 they're not creditors. They're not filing a claim for it.

4 MR. ORTIZ: But even if they were --

5 THE COURT: -- under 502(d).

6 MR. ORTIZ: But, right. But even if they were
7 creditors, which they're not, 502(d) essentially provides
8 you a choice. You can sit there and say I'm going to keep
9 these funds and not file a proof of claim and see if the
10 Debtor comes and then I'll share pro rata or I'm going to
11 give it all back and take what's pro rata and there's a risk
12 that you take there and that's -- they don't even have that
13 and they're in a higher position as titleholders. And I
14 think --

15 THE COURT: Higher position as titleholders with a
16 good faith basis for preference avoidance actions for their
17 having gotten title back.

18 MR. ORTIZ: But I don't think it's even they
19 haven't got title back. They have title, right. It's --

20 THE COURT: Got it back --

21 MR. ORTIZ: Possession --

22 THE COURT: -- 89 days before the bankruptcy
23 filing, giving rise to a good faith basis for preference
24 claims.

25 MR. ORTIZ: Right. Got title back within 90 days,

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1 Your Honor.

2 THE COURT: Let me hear from other counsel. Ms.
3 Kovsky, I -- come on up to the podium.

4 MR. ORTIZ: Thank you, Your Honor.

5 THE COURT: Thank you. So let me just say, the
6 issue of whether the Withhold account holders have title or
7 not is not being decided today. Okay. But if the Court
8 decides let's push forward with phase two, my strong
9 preference is for you to agree that you will actively
10 proceed with phase two with your clients. The stipulation
11 is less clear what happens if I don't decide phase one.

12 MS. KOVSKY-APAP: Understood, Your Honor, and I
13 think we had all sort of contemplated there would be a
14 decision before triggering phase two.

15 THE COURT: Well, there's a decision as to the
16 Custody.

17 MS. KOVSKY-APAP: Absolutely. And one thing I
18 just wanted to flag because Your Honor had said something in
19 the morning session that sort of struck me, but I wasn't
20 sure I fully understood it. You said that in this phase,
21 you're only looking at whether the contract is ambiguous or
22 not and deciding within the four corners of the contract and
23 I don't think that's quite what the parties have stipulated
24 and what we had intended to put before Your Honor.

25 It was who owns it, including whether the contract

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1 is ambiguous, but not limited to that, which is sort of why
2 we put in all of these facts and had all this evidence that
3 was admitted into the record. But I just wanted to make
4 sure that that was flagged as a housekeeping --

5 THE COURT: Bullet point 1.5, bullet point,
6 Paragraph 5, whether the assets in the Custody and Withhold
7 accounts are property of the Debtors' estates, including
8 whether the terms of use are unambiguous on the issue of
9 ownership of such assets." And including. It doesn't say -
10 -

11 MS. KOVSKY-APAP: I think the part -- just to
12 clarify, I think the parties' intent was that Your Honor
13 would look at everything, including the evidence that we
14 submitted to the record. With respect --

15 THE COURT: Do I have everything that either party
16 would want to introduce on the issue of extrinsic evidence
17 regarding the meaning of the contract with respect to
18 Withhold account holders?

19 MS. KOVSKY-APAP: I have to be really honest, Your
20 Honor, I was kind of thrown for a loop when the Debtors
21 completely did a 180 on their position as to the ownership
22 of the Withhold assets.

23 THE COURT: Well I noted with -- the flip, too --

24 MS. KOVSKY-APAP: And -- yes. And with the luxury
25 of more time and had Your Honor not been in hearings this

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1 entire week with everybody tied up, you know, on various
2 different matters, I would have sought discovery on those
3 issues to pin that down, because it's an entirely different
4 factual landscape than what we thought we were dealing with.
5 So if --

6 THE COURT: It's not entirely different from what
7 it was when you entered into the stipulation. It's when you
8 got the first brief, this is their position, and then you
9 get the reply and the position changes.

10 MS. KOVSKY-APAP: Well, really, if you go back to
11 the original Custody and Withhold motion, the motion to
12 reopen withdrawals, that was really where we were starting
13 from and then the Debtors went in completely the opposite
14 direction. So in answer to your question is all of the
15 evidence in the record that we would want to have in the
16 record, probably not. And if we had the opportunity to take
17 some additional discovery and to put the full universe of
18 facts before Your Honor --

19 THE COURT: Don't start that before I issue some
20 sort of ruling, okay.

21 MS. KOVSKY-APAP: Understood. With respect to
22 phase two -- or let me back up. With respect to the
23 question of if Your Honor were to rule in favor of the
24 Withhold account holders at some time before phase two,
25 should the Withhold account holders be allowed to withdraw

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1 their assets, we're a little bit differently situated than
2 the Custody account holders. There's no pending adversary
3 proceeding. We're in prohibited states where the Debtors
4 can't hold assets on behalf of customers.

5 So they've got a regulatory problem in nine
6 states. It's a pretty small problem. It's only nine
7 states. It's only about 5,000 accounts. So there is a
8 little bit of a different impetus to say, okay with these,
9 with this small bucket off to the side, maybe it makes sense
10 to send these off and send them back to the Withhold account
11 holders, even if there's some risk that there might be
12 increased cost or difficulty in collection later, if the
13 Debtors bring a preference, if they're successful, if -- you
14 know, there's a lot of ifs built in there.

15 And one thing I did want to just note, we framed
16 this in our brief as a basically a prejudgment attachment.
17 And I think that's really what it is, and I think that's
18 sort of what Mr. Ortiz was articulating that you have
19 something that is -- and certainly with Custody and arguably
20 our position with respect of the Withhold --

21 THE COURT: If I rule that it's property of the
22 Withhold account holders, you have the same preference issue
23 Mr. Ortiz has.

24 MS. KOVSKY-APAP: We do have the same preference
25 issue, but notwithstanding that same preference issue, there

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1 are countervailing considerations.

2 THE COURT: You have the same preference issue
3 that Mr. Ortiz's clients have.

4 MS. KOVSKY-APAP: Yes, we do, Your Honor.

5 THE COURT: And while you didn't file an adversary
6 proceeding, you filed a motion to lift the stay. The
7 Debtors -- we've essentially gotten over that procedural
8 hurdle. We did the stipulation. I'm trying to deal with
9 them all together. The Debtors could file their preference
10 action if I were to rule that it's property of the Withhold
11 account holders.

12 MS. KOVSKY-APAP: Correct, Your Honor, and to
13 answer the question you haven't asked yet, no, we do not
14 want them to do that.

15 THE COURT: I'm sure Mr. Ortiz doesn't want them
16 to do that either. I'm sure his clients don't want them to
17 do that.

18 MS. KOVSKY-APAP: I hear Your Honor and I hear
19 your position on this, and I won't take up more of your
20 time. I just wanted to flag that there were some procedural
21 differences and some regulatory differences that
22 notwithstanding the Court's disinclination to let property
23 go that the Debtors have ready access to in the event that
24 they get a judgment, there are some countervailing
25 considerations that are applicable to the Withhold account

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1 holders.

2 THE COURT: Thank you.

3 MS. KOVSKY-APAP: Thank you.

4 THE COURT: All right, let me hear from the
5 Debtors. Mr. Koenig.

6 MR. KOENIG: Good afternoon, Your Honor. Chris
7 Koenig, Kirkland and Ellis, for the Debtors. I'll keep it
8 brief here, but just wanted to raise a couple of points.
9 From the Debtors' perspective, we entered into the
10 stipulation to streamline the process, try to shorten the
11 process from what it would otherwise be if it was a full on
12 adversary proceeding and to try to minimize costs for the
13 estate. The estate is very expensive. We would like to get
14 to the right --

15 THE COURT: -- also want to minimize the cost to
16 Mr. Ortiz's clients.

17 MR. KOENIG: Certainly, certainly. And so --

18 THE COURT: And --

19 MR. KOENIG: And for all parties to have answers
20 on key issues as promptly as possible. I think all the
21 parties agree that the preference defenses are complex,
22 novel, and difficult, and we're going to be working through
23 that in phase two, but rather than, in the early days --

24 THE COURT: -- try to settle them as well.

25 MR. KOENIG: Of course. In the early days of

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1 September, we filed our motion, the Custody Ad Hoc Group
2 filed their adversary proceeding. I forget whether they
3 filed it first or we filed it first, but it was in a matter
4 of minutes or hours from each other. And Ms. Kovsky filed
5 her lift stay motion maybe a day or two later.

6 We could have at the time filed our own
7 counterclaims, filed our own adversary proceeding, but we
8 didn't think that that made sense. What we thought made
9 sense was to streamline the process, try to minimize the
10 cost, and try to get to the right answer as promptly as
11 possible. Because if everybody just sues everybody, it's
12 going to create a lot of paper. It's going to create a lot
13 of cost, but it's not going to necessarily get to the right
14 answer.

15 And so what we did is we entered into this
16 stipulation, which allows all the parties to pick what are
17 effectively bellwether defendants for these preference
18 claims so that all parties will receive from Your Honor in
19 phase two, indicative rulings under a whole host of
20 different factual circumstances. Maybe the preference
21 claims are different if somebody withdrew the day before the
22 pause versus 89 days before the pause. Maybe it matters how
23 much they withdrew. Maybe it matters what remains on the
24 Debtors' platform, if any.

25 Those are all issues for phase two, but we did

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1 this in order to get clarity and to try to minimize costs,
2 and that's why we did what we did. Of course, in the
3 absence of a stipulation, we would have commenced a whole
4 host of other litigation because, you know, my litigation
5 partners, when they looked at this issue said we have to
6 file. We have to file a complaint. We have counterclaims
7 that have to be asserted, and we said that just doesn't make
8 sense here. Let's get to the right answer.

9 THE COURT: I agree with your partners.

10 MR. KOENIG: They're certainly smarter than I am
11 on this issue, Your Honor.

12 THE COURT: Well.

13 MR. KOENIG: So in any event, simply put, today
14 the Debtors have an effective remedy with respect to the
15 Custody and Withhold assets to the extent Your Honor would
16 enter judgment in favor of the Debtors on any preference
17 claim. We could simply move the assets on the ledger, on
18 the blockchain, whatever Your Honor ordered us to do, we
19 could do. There would be no cost. There would be no risk.
20 There would be no delay.

21 If we were to return those assets to the custodial
22 account holders and the Withhold account holders -- easy to
23 say -- we would undoubtedly have risk, cost, and delay.
24 That is a natural -- that is a natural consequence.

25 THE COURT: Your Honor, in Motors Liquidation when

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1 they sued 500 financial institutions, many of whom were
2 outside the United States, there were a whole host of
3 problems about service of process outside the United States,
4 compliance with the Hague convention and it became -- and
5 that was only 500. We got it resolved, but that issue, and
6 then tried -- they tried -- they agreed we would try as
7 certain of the parties and everybody would be bound. But I
8 can't imagine what it would -- the issues, because they're
9 not all sitting down the street in New York. The service of
10 process issues alone -- anyway.

11 MR. KOENIG: So for that reason the Debtors
12 believe it is appropriate for them to maintain possession
13 and control over the Custody assets and the Withhold assets,
14 pending our expedited phase two proceeding. And then
15 depending on what Your Honor rules, today we believe that we
16 have prima facie preference claims. We have established
17 that we have prima facie preference --

18 THE COURT: No one disputes that.

19 MR. KOENIG: And at some point in the future we
20 may not, depending on how Your Honor rules in the various
21 defenses. Perhaps Your Honor will rule that Section 546(e)
22 is a complete bar to any preference claim. Perhaps Your
23 Honor will rule that ordinary course of business defense
24 applies in every possible circumstance. Maybe Your Honor
25 will rule that it applies in some circumstances, but not

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1 others. We don't know until we get there. So we'd like to
2 hold onto the assets and preserve value until we get there.

3 THE COURT: Okay.

4 MR. KOENIG: I don't have anything else unless
5 Your Honor has questions for me.

6 THE COURT: Did you want to be heard?

7 MR. KOENIG: Thank you.

8 MR. HERSHLEY: Very, very briefly.

9 THE COURT: Just go up to the microphone, Mr.
10 Hershey, so we get a clear record.

11 MR. HERSHLEY: Good afternoon now, Your Honor. Sam
12 Hershey, White and Case for the Committee. I'll be
13 extremely brief.

14 Your Honor asked a question. I'll just briefly
15 say, we agree with Your Honor, it's a compulsory
16 counterclaim. The last sentence actually of the complaint,
17 DI-662, this is Paragraph 62, says "The Debtor should be
18 required to permit withdrawals of Custody assets in
19 accordance with the terms of use." They requested that
20 relief. We viewed it as a compulsory claim. That's why we
21 actually entered into the terms in the stipulation that Your
22 Honor read. I think you've figured that out. And we don't
23 believe Your Honor should exercise your discretion to grant
24 partial summary judgment.

25 THE COURT: Okay.

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1 MR. HERSHY: -- that, we'll rest on our brief.

2 Thank you.

3 THE COURT: Thank you. Ms. Kovsky, go ahead.

4 MS. KOVSKY-APAP: Deb Kovsky for the Withhold
5 Group again. Just wanted to raise one issue following on
6 something that Mr. Koenig just said, is that the Debtors are
7 able to hold on to these assets and are going to be there
8 and it's going to be just fine and, you know, there's no
9 risk or harm to them holding onto them, and that's true with
10 everything that's in the Custody wallet because they've put
11 those aside and aren't doing anything with them. There's
12 still a question mark -- and Your Honor said you're not
13 prepared to rule on it today -- as to the ownership of the
14 Withhold assets which are currently sitting in an aggregated
15 wallet.

16 And so as we proceed down this path, I would
17 request that some measures be put into place to ensure that
18 at a minimum enough assets are kept sort of --

19 THE COURT: Let me --

20 MS. KOVSKY-APAP: -- set aside to satisfy the
21 Withhold --

22 THE COURT: -- raising. What I would ask you to
23 do is to confer with the Debtors' counsel and see if you can
24 come up with an appropriate solution for this by having some
25 agreed assets put into a separate a wallet to be held. It's

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1 not a separate wallet because they're different coins in
2 those different wallets, but work out, see if you can work
3 out the arrangements. If you can't, contact my chambers and
4 we'll have a, hopefully a very brief -- I have a feeling
5 you're going to work this out.

6 I understand your point and I'm not -- see if you
7 can work this out. If you can't, we'll have another quick
8 hearing.

9 MS. KOVSKY-APAP: Well do, Your Honor. Thank you.

10 THE COURT: All right. Mr. Koenig, what's your
11 view about the issue Ms. Kovsky's just raised?

12 MR. KOENIG: Your Honor, Chris Koenig. I
13 understand and I had not thought about that. I think it's a
14 great issue that Ms. Kovsky raised, I think that we need to
15 talk about. I understand her point that, you know, her
16 client should not be prejudiced by, you know, the lowest
17 intermediate balance test is met for today with respect to
18 five coins and I understand her point that she doesn't want
19 to wake up tomorrow and have it be, you know, only five
20 coins that it is met for. So we'll meet and confer and --

21 THE COURT: You ought to be able to work this out.

22 MR. KOENIG: Yes.

23 THE COURT: Okay. Ms. Kovsky, I guess the last
24 question is, are you prepared to push forward with phase two
25 even though I haven't ruled as to your clients with respect

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1 to phase one?

2 MS. KOVSKY-APAP: Yes, Your Honor.

3 THE COURT: Okay. All right.

4 MR. ORTIZ: Your Honor, I just want to make a --

5 THE COURT: Go ahead, Mr. Ortiz.

6 MR. ORTIZ: -- quick point of clarification on
7 something that you said. Not rising to try to change your
8 mind. I know how to read a room. I just wanted to note
9 that with regard to the Custody assets that was only
10 eligible to people in the United States. So when we get to
11 that point, if that's a thing, that the collection risk you
12 talked about in Motors Liquidation for, you know, service
13 and for foreign entities is not really a concern in
14 connection with this particular asset.

15 THE COURT: Okay. So we don't have the foreign
16 service issues, but we may well have service issues in the
17 U.S. I don't -- look, just so that the record is clear, the
18 Court is declining to enter judgment in favor of the Custody
19 account holders with respect to the crypto assets in the
20 Custody -- held by Custody.

21 I'm also declining, even though there's no
22 disagreement about the title to it, I decline to order those
23 assets turned over to the Custody holders. I do so for
24 three reasons at this point, the stipulation that counsel
25 entered and the Court -- the Court entered, counsel approved

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1 ECF Docket No. 1044; the agreement for how the procedures in
2 this case would go forward. As to phase one at least for
3 the Custody holders I believe we've resolved that issue.
4 We're going to move forward with phase two.

5 I think you have all been overly aggressive in the
6 schedule you've set, but you put it in the stipulation so
7 either adjust the schedule or let us push forward with the
8 schedule. I approved that stipulation. So --

9 CLERK: Your Honor --

10 THE COURT: Hold on. The basis for my ruling is
11 the stipulation, ECF Docket No. 1044, Bankruptcy Rule 7013
12 which makes Federal Rule of Civil Procedure 13 applicable to
13 adversary proceedings, the preference claims that the
14 Debtors or someone authorized to act in the Debtors' place
15 could assert their good faith claims. They are either
16 compulsory counterclaims under 13(a) or permissive
17 counterclaims 13(b). I don't have to fully resolve that
18 issue. It certainly seems to me that they're compulsory
19 counterclaims under 13(a)(1)(A) and (B).

20 The stipulation that the parties entered extended
21 the time of the Debtors to answer the Custody holders
22 complaint until the issues set forth in the stipulation
23 setting forth the agreed schedule until they're resolved;
24 they're not all resolved. And under Rule 7054(b), under
25 these -- under the circumstances we've talked about today, I

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1 would not exercise my discretion to enter partial judgment
2 ordering that the Custody assets be returned to the Custody
3 holders.

4 So that's my ruling. I'm not going to write a
5 separate order on it. I'm so ordering the transcript and
6 we'll push forward from there.

7 CLERK: Judge?

8 THE COURT: Yes.

9 CLERK: We have a raised hand.

10 THE COURT: Okay, let me hear.

11 CLERK: Mr. Mendelson, please unmute.

12 MR. MENDELSON: Yes --

13 THE COURT: Good afternoon, Mr. Mendelson.

14 MR. MENDELSON: Thank you, Your Honor, for
15 acknowledging me again. As a layperson, I'm a little
16 confused here because I'm confused if the estate is bringing
17 a preference claims, if the estate is bringing up preference
18 claims as Mr. Ortiz mentioned and as I believe you
19 mentioned, the preference claims wouldn't just be against
20 Custody. It would be against the \$2 billion of assets that
21 were removed from the platform including those international
22 individuals, non-U.S. citizens. So it stretches beyond the
23 50,000 number that you mentioned.

24 And to me as a layperson sitting here, it's (audio
25 drops) impossible that the Court would do that, would allow

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1 that. Too much time, too much money. I don't know how
2 we're going to collect from a dude in Bangladesh. And if
3 that is not possible to do, then if the estate does bring up
4 preference issues, it would only negatively affect U.S.
5 citizens who are now stuck in Custody. The old adage, the
6 man with the gold makes the rules. They have our gold.
7 They would essentially be making the rules and we would be
8 unfairly treated if that was the case, and I just wanted to
9 bring that up. I don't see how the Court is going to allow
10 preference for all the assets that were removed off the
11 platform within 90 days.

12 And Mr. Dixon brought up that international users
13 were not allowed Custody, which is 100 percent true, and to
14 the benefit of all those international users that were able
15 to remove assets off of the platform, unlike U.S. users who
16 were not able to just remove assets off the platform, rather
17 than go through Custody. I just want to bring it to your
18 attention. I feel like right now this preference issue is
19 just a filibuster and a time waster to get back our property
20 that I believe that we own and deserve to be in possession
21 back of, and I do appreciate your time.

22 THE COURT: Thank you, Mr. Mendelson. Let me just
23 say this. I'm dealing with an adversary complaint filed by
24 the Ad Hoc Group of Custody account holders. I'm not
25 dealing with the account holders at large in the U.S.,

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1 outside the U.S. I'm dealing only with the Custody account
2 holders who filed the adversary proceeding.

3 The issue about the compulsory counterclaim only
4 exists as of now as to those -- that group of people, not
5 anywhere else in the world. The Custody is only people here
6 in the U.S., but you know, one of the things that I think in
7 good faith, both the Debtors' counsel, the Committee's
8 counsel, and the Ad Hoc Committee's counsel have tried to do
9 is identify things that are sort of what I would refer to as
10 the gating issues.

11 If the Court can resolve them as to some groups of
12 creditors, it may well be rules that would suggest the
13 outcome as to everybody else. So that's what I'm trying to
14 do. That's what I think the Ad Hoc Committees were trying
15 to do. We'll see whether it accomplishes what the goal was
16 or not, but -- so I appreciate your comments and your
17 concerns.

18 Trust me when I tell you, I have concerns. I want
19 this case to move forward. I want the creditors to recover
20 as much as they possibly can as soon as they possibly can.
21 And I don't -- my own, you know, people can disagree about
22 this. I don't think that the Debtors' counsel or the
23 Committee's counsel or Ad Hoc Committee's counsel have had
24 any other goal than trying to get as many issues resolved as
25 soon as possible.

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1 You know, it's the same at the hearing yesterday,
2 this came up, I think. The Debtors and the Committee have
3 committed to this dual path, standalone restructuring, sale.
4 The goal either way is to maximize the value of the estate
5 so that you and every other account holder, whether they're
6 in the U.S. or outside the U.S., can get the maximum
7 recovery possible. And I'm trying to push this. Trust me
8 when I tell you I'd be a lot happier myself if I wasn't
9 spending day and night working on the issues in this case,
10 okay, so I appreciate your comments.

11 Deanna, does anybody else wish to be heard?

12 MR. MENDELSON: Your Honor, if I may just respond
13 really quickly?

14 THE COURT: go ahead, Mr. Mendelson.

15 Mr. MENDELSON: First of all, I absolutely do
16 trust you. I think the U.S. Court system is the best Court
17 system on the planet. However, when you, when you mentioned
18 Custody and preference, aren't we talking about clawbacks?
19 And if we're talking about clawbacks -- please correct me if
20 I'm wrong -- if we're talking about clawbacks, clawbacks
21 just don't apply to Custody. It would apply to everyone
22 within that --

23 THE COURT: Well, it potentially -- it could. You
24 know, the issues about Custody are different because there
25 was this bright line of 89 days before. It's a -- look, if

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1 you assume that the assets in the Earn account were property
2 of the Debtors' estate, there was a transfer of that
3 property to the Custody account holders, 89 days before.
4 Ninety days is sort of one of the magic markers. For
5 insiders, it's one year. But that's what tees this up. I
6 can't, you know, I can't see around every corner and I'm
7 trying to be careful not to rule on things that have
8 unintended consequences, but I'm ruling on the things that
9 are before me. So, but I appreciate your concerns.

10 Deanna, is there anybody else who wants to be
11 heard?

12 CLERK: I do not see any raised hands, Judge.

13 THE COURT: All right.

14 CLERK: Sorry, Judge. Someone just raised a hand,
15 Michael Yankoski.

16 THE COURT: All right, Mr. Yankoski, go ahead.

17 MR. YANKOSKI: Yes, Judge Glenn, Your Honor.

18 Thank you for hearing me this me this afternoon and thank
19 you for all your time on this. I simply want to raise the
20 point that due to the fluctuating nature of the
21 cryptocurrency markets and I assume that this is going to be
22 a point that's brought up in the phase two hearings, but due
23 to the massive volatility of the cryptocurrency markets,
24 should retail clawbacks preference actions be brought
25 against retail clawback -- retail customers of the Celsius

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1 platform, it's highly likely that that would cause tens if
2 not hundreds of thousands of personal bankruptcies because
3 assets have been withdrawn during that 90 days, which may
4 have, as Mr. Ortiz mentioned, collapsed by 40 percent or in
5 some instances 80, 90 percent and the possibility of
6 returning those to the Debtors' estate is virtually
7 impossible -- not just procedurally impossible, but it's
8 going to be literally impossible for tens, if not hundreds
9 of thousands of retail customers. I'm sure you're aware
10 that. I just wanted to put it on the record and bring it to
11 attention. Thank you, sir.

12 THE COURT: Look, I'm not going to get into the
13 issue of -- I'm not going to talk specifically about
14 defenses available under the -- for a preference action
15 under 547. The transfers to the Custody accounts sort of
16 happened in, if not in one fell swoop, it happened pretty
17 quickly. To the extent there were withdrawals in the
18 ordinary course of business, for example, there may well be
19 defenses. And I'm not ruling out the defense of ordinary
20 course of business even here. But it just -- Mr. Yankoski,
21 it raises a host of issues and there are a lot of good
22 lawyers involved and we'll just have to see how it plays
23 out.

24 Deanna, is there anybody else who wants to be
25 heard?

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1 CLERK: Yes, Cheryl Bierbaum.

2 THE COURT: Okay, Ms. Bierbaum, go ahead.

3 MS. BIERBAUM: Yes, Judge. Thank you for this
4 time. I just want to relay I'm an advocate of course for
5 all Custody and Withhold to be released, if that's what's
6 deemed by the Court, but in the meantime, with this
7 preference (audio drops), there was the discussion of pure
8 Custody or pure Withhold accounts. Those would not be
9 subject to preference, in my understanding. Is that
10 something that could be determined to be released now as
11 we're awaiting phase two for the remainder accounts?

12 THE COURT: And I'm glad you raised it because I
13 did have it on my list of issues before we close today. Mr.
14 Koenig, let me ask you to rise. Let's see if we can break
15 it down into the group. So one group, is the pure Custody
16 accounts. So people who never were in Earn and deposited
17 into Custody, are there objections to returning that portion
18 of the assets?

19 MR. KOENIG: For the record, Your Honor, Chris
20 Koenig, Kirkland and Ellis, for the Debtors. We filed the
21 motion three months ago. There were a variety of
22 objections. I think it's difficult to say that there were
23 no objections to that point because there were so many
24 folks.

25 THE COURT: Let me -- I've considered this

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1 carefully and their -- the objections are overruled. The --
2 what I would consider the pure Custody account holders,
3 people who deposited -- their assets were not moved from
4 Earn to Custody. There is no preference. There's no good
5 faith argument of an avoidable preference against them.
6 There's no dispute as to their having title and the assets
7 should be returned to them. Prepare an order in appropriate
8 format. Okay. So that's the group of the pure, what I
9 would -- shorthand it by talking about the pure Custody
10 account holders. Okay.

11 Then you've also included in your motion the
12 account holders where the potential preference claim is
13 below the statutory threshold, was, is it, \$7,000 --

14 MR. KOENIG: \$7,575, Your Honor, and that's the
15 requirement of 547(c)(9), so what we've been arguing about
16 today is that the Debtors have prima facie preference
17 claims, but we only have prima facie preference claims to
18 the extent that transfer is in excess of the --

19 THE COURT: I agree. Is there anybody objecting
20 to the return of assets from Custody for anyone with less
21 than the 7,500-odd dollars?

22 MR. COLODNY: Your Honor, Aaron Colodny on behalf
23 of the Official Committee. I believe we talked before about
24 our position that it should be a pro rata distribution due
25 to the shortfall. I think that that applies to both pure

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1 Custody and the amount below to the extent you rule that
2 only the amounts in the wallets would be subject to their
3 property rights.

4 THE COURT: So Mr. Colodny, let me ask you. Is
5 there -- how many coins is there a shortfall?

6 MR. COLODNY: I believe it's about 6 percent, Your
7 Honor.

8 THE COURT: Six percent in --

9 MR. COLODNY: In aggregate amount of the
10 obligations --

11 THE COURT: But how many coins?

12 MR. COLODNY: I believe there's a number of
13 different currencies, so I don't know the number of coins.

14 THE COURT: So, you know --

15 MR. COLODNY: About \$16.9 million.

16 THE COURT: I understand that. But as to people
17 who deposited Bitcoin, is there a shortfall in Bitcoin?

18 MR. COLODNY: Meaning, do -- is all --

19 THE COURT: Maybe I'm --

20 MR. COLODNY: All of the --

21 THE COURT: Don't I have to resolve this issue on
22 a coin-by-coin basis?

23 MR. COLODNY: I believe you do, Your Honor. I
24 believe we said that in our papers.

25 THE COURT: Okay. And is there a disagreement?

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1 Can the Debtors and the Committee agree on the coins as to
2 which there is no shortfall? And would you agree that as to
3 the Custody account holders, either the pure Custody account
4 holders or the below the preference threshold, how many, who
5 is -- how many are affected by a shortfall? They have to
6 have deposited coins for which there is a shortfall, right?

7 MR. COLODNY: Right. To the extent there are
8 sufficient coins in the Custody wallets to cover the
9 obligations, I don't see any reason we couldn't agree with
10 the Debtors to let those go.

11 THE COURT: Okay. Do -- have you and the Debtor
12 tried to resolve that issue? I don't know what -- I don't
13 know the numbers. I mean I don't know what, how many
14 account holders, Custody account holders are faced with the
15 issue of a shortfall in the particular coins that they
16 deposited into Custody.

17 MR. COLODNY: I don't know the answer to that coin
18 by coin, Your Honor, but I think that's something that
19 either Mr. Koenig and I or our financial advisors could
20 easily --

21 THE COURT: Well, let me -- Mr. Koenig come on up.
22 Both of you stand at the podium. I'm forcing you to stand
23 next to each other, even if you're unmasked. Has the Debtor
24 tried to reconcile this?

25 MR. KOENIG: We were -- Your Honor, Chris Koenig.

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1 We were expecting to get a ruling and to meet and confer
2 with the Committee depending on the outcome of the phase one
3 --

4 THE COURT: Meet and confer with the Committee.

5 MR. KOENIG: We certainly intend to do so. I
6 mean, certainly there are some shortfalls. We'd like to
7 reach a resolution that is efficient and makes --

8 MR. COLODNY: Your Honor, just clarification.

9 We're looking at Docket No. 1532 which I think is the
10 supplemental declaration of Oren Blonstein and exhibit -- I
11 think this is Exhibit 1, shows as of petition date the
12 shortfall. So we have the information.

13 MR. KOENIG: We'll speak with the Committee and
14 find a way to resolve this and if we can't we can't, but one
15 of the things -- in the original order that we attached to
16 the motion, we recognized that actually opening up
17 withdrawals and identifying which accounts are subject to
18 the 7575 is not the easiest task and we committed to work
19 with the Committee in that order that we would either agree
20 on the schedule of individuals to have their coins, you
21 know, they can be withdrawn because they're either pure
22 Custody or they're below the 7575 cap and that we would work
23 with the Committee to identify those individuals because
24 there's, of course, you know, maybe somebody had both pure
25 Custody and a transfer and so there's some work that I think

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1 has to be done.

2 THE COURT: And then I think what you have to do -
3 - and I see one of the pro se creditors wants to be heard
4 and I'll hear from you in just a moment -- see if you can
5 reach a stipulation agreement, then you're going to have to
6 serve the account holders and give them a chance if any of
7 them -- if they're getting back everything that they put in,
8 I mean, you've still got to give them notice.

9 But the issue for those where there is a shortfall
10 and -- so I understand that there was a difference in view
11 between a pro rata distribution and lowest intermediate
12 value. See if you can reach an agreement as to that. I
13 don't know. I don't know how much of a delta that --

14 MR. KOENIG: I don't believe the dollar amount
15 will be all that significant, but we can work with the
16 Committee and our financial advisors.

17 THE COURT: Because you could easily spend more
18 money figuring it out.

19 MR. COLODNY: And Your Honor, we don't have any
20 interest in holding up distribution. So we're not standing
21 before you to belabor --

22 THE COURT: Okay.

23 MR. KOENIG: We will figure it out and we will
24 submit a proposed order and serve all account holders on
25 whatever notice Your Honor believes is appropriate, whether

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1 you'd like to be seven days' notice or more regular --

2 THE COURT: Fourteen days.

3 MR. KOENIG: Fourteen days' notice. Very good.

4 THE COURT: Let me -- Deanna, who's on the screen?

5 I should recognize you because you spoke this morning.

6 CLERK: Tony Vejseli. My apologies if I
7 mispronounce your name.

8 THE COURT: Go ahead. You've hung in there this
9 afternoon, so --

10 MR. VEJSELI: Yes, I. Sorry. Tony Vejseli. I
11 just wanted to make the point again, I know I made it
12 before, but the Debtor and the UCC are trying to hold up the
13 pure Custody for the ones that do have an active loan that
14 is still good -- in good standing. So I just want to throw
15 that out there.

16 THE COURT: Okay.

17 MR. VEJSELI: Thank you, Judge.

18 THE COURT: Thank you. Anybody else?

19 CLERK: Rebecca Gallagher.

20 THE COURT: Ms. Gallagher.

21 MS. GALLAGHER: Yes, Your Honor. I have looked
22 into some of the things we were talking about earlier and
23 indeed the Debtor does have an MSB license but that does not
24 grant them the ability to offer a Custody service.

25 THE COURT: Ms. Gallagher, you don't have any

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1 assets in a Custody account because you're not in the United
2 States. You don't have any --

3 MS. GALLAGHER: No, I have all -- I have all my
4 assets in Earn and every dollar that you pay to these people
5 that doesn't get the same haircut that I will get, is a very
6 --

7 THE COURT: Okay.

8 MS. GALLAGHER: -- unfair --

9 THE COURT: Okay --

10 MS. GALLAGHER: -- inequitable --

11 THE COURT: The objection is overruled. Okay.

12 MR. KOENIG: Your Honor, I just want to clarify
13 for the record. So you are granting the motion with respect
14 to pure Custody --

15 THE COURT: I am.

16 MR. KOENIG: -- and transferred Custody below the
17 7,575 --

18 THE COURT: Correct.

19 MR. KOENIG: -- threshold with the Debtor and the
20 Committee to meet and confer about the pro rata issue.

21 THE COURT: Yes.

22 MR. KOENIG: The Court is not granting the order
23 with respect to either pure Withhold or transferred
24 Withhold?

25 THE COURT: Correct. I can't decide -- Ms.

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1 Kovsky, you want to be heard further? I don't have
2 everything decided today. Sorry if I'm disappointing you,
3 but --

4 MS. KOVSKY-APAP: Your Honor, Deb Kovsky for the
5 Withhold Group. I think that given where we are and the
6 Committee raising objections, although the -- I think we and
7 the Debtors are aligned that pure Withhold is not property
8 of the estate and certainly, you know, anything that was
9 newly deposited on should go back promptly to the account
10 holders since there's no possible preference claim there.

11 THE COURT: Let me ask. Mr. Koenig, is that
12 correct? The Debtor agrees with Ms. Kovsky about the pure
13 Withhold?

14 MR. KOENIG: Your Honor, I -- Chris Koenig. I
15 agree. The pure Withhold is different than the transferred
16 Withhold.

17 THE COURT: Okay. And Mr. Colodny, do you
18 disagree?

19 MR. COLODNY: We do, Your Honor, with respect to
20 the pure Withhold that is not the BNB or other tokens that
21 were not supported by the Debtors.

22 THE COURT: Just articulate for me briefly why you
23 --

24 MR. COLODNY: So BNB tokens are I think less than
25 half a percent of pure Withhold. The majority of pure

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1 Withhold are unaccredited investors who transferred to the
2 Debtors and the Debtors could not support it but took the
3 assets and used them as if they were their own. And it's
4 our position that by taking the assets, using it as their
5 own, they exercised control over the --

6 THE COURT: They comingled and deployed the
7 assets.

8 MR. COLODNY: Correct, and so to take those assets
9 and to distribute them now would take them away from other
10 Earn holders that may have an equal entitlement into those
11 assets.

12 THE COURT: But there is some group of Withhold
13 account holders who deposited --

14 MR. COLODNY: BNB tokens, other unsupported
15 tokens.

16 THE COURT: You agree as to them?

17 MR. COLODNY: Provided that the Debtors have them
18 sitting in their bank accounts, I don't have any problem
19 releasing those.

20 THE COURT: Mr. Koenig, is there some group of
21 them that could be returned?

22 MR. KOENIG: Chris Koenig. I believe so, Your
23 Honor. We'll work with the Committee --

24 THE COURT: Work with the Committee and Ms.
25 Kovsky. I would like whoever can get their property back

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1 now, I'd like them to get it back now.

2 MR. KOENIG: We agree, Your Honor.

3 THE COURT: Okay. Mr. Ortiz?

4 MR. ORTIZ: Sorry, Your Honor. Good afternoon
5 again. Kyle Ortiz for the Custody Group. We have a couple
6 of people who either in whole or in part are pure Custody,
7 so we'd just ask to be part of those discussions. We're --

8 THE COURT: Absolutely.

9 MR. ORTIZ: -- definitely not going to do anything
10 to slow it down.

11 THE COURT: I agree.

12 MR. ORTIZ: Thank you, Your Honor.

13 THE COURT: Okay.

14 CLERK: Sorry, Judge. We have a few more raised
15 hands.

16 THE COURT: Okay. Take them in the order in which
17 they raise their hands.

18 CLERK: Okay, John Bazolist.

19 MR. BAZOLIST: Yes, thank you. So Judge, I
20 appreciate your time today. I actually had asked a question
21 earlier and as it seems with this case, there are a lot of
22 edge cases, so this one relates to the Custody and pure
23 Custody. If somebody had funds in Custody that were -- had
24 touched Earnings at one point who had subsequently transferred
25 additional pure Custody funds over to Custody, is it fair to

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1 say that those additional pure Custody funds are eligible
2 for repayment but not the original Custody funds?

3 THE COURT: Mr. Koenig?

4 MR. KOENIG: Your Honor, I --

5 THE COURT: I think.

6 MR. KOENIG: Make sure I heard the question
7 correctly. To the extent that were pure Custody funds that
8 were never in Earn but there were also funds that were in
9 Earn and were transferred to Custody, are the pure Custody
10 funds still eligible? The answer is yes.

11 THE COURT: Yes.

12 MR. KOENIG: From our perspective because --

13 THE COURT: Yes.

14 MR. KOENIG: -- there was no transfer --

15 THE COURT: I agree.

16 MR. KOENIG: -- of the Debtors' interest in
17 property.

18 THE COURT: I hope that answers the question.

19 With respect to the pure Custody -- and you'll get notice
20 and an opportunity to object if you disagree. And it ought
21 to set out clearly if there's some people that a combination
22 of Earn that moved over versus pure Custody, that that's
23 explained.

24 MR. KOENIG: We'll do our best to explain the
25 mechanics because it will be a little bit complicated and

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1 we'll work with the Committee, Your Honor.

2 THE COURT: Okay. All right.

3 MR. BAZOLIST: Just one additional wrinkle there.

4 If you're not pure, if your original Custody funds are over
5 that statutory limit, but your pure Custody is under that
6 statutory limit, does that disqualify you or are you still
7 eligible for those funds?

8 THE COURT: Pure Custody, there's no preference
9 issue.

10 MR. KOENIG: Correct. The Debtor agrees.

11 THE COURT: Yeah. Yeah, as to the pure Custody,
12 there is no preference issue because it wasn't property of
13 the estate that was transferred into a Custody account. For
14 property that was in an Earn account and was transferred to
15 Custody, that raises the preference issue.

16 MR. BAZOLIST: Okay, understood.

17 THE COURT: Okay. Anybody else?

18 CLERK: We have Tony Vejseli again -- I'm sorry, I
19 keep mispronouncing your name.

20 MR. VEJSELI: All right --

21 THE COURT: You're getting close, though.

22 MR. VEJSELI: Yeah, that's good enough. You got
23 there. Sorry, this is the last one for me. I just wanted
24 just more clarity from the Debtor. I just want to make sure
25 that they're aware of the situation I'm talking about and I

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1 don't really care too much about myself, but I know there's
2 a lot of people that fall under the 7,500 threshold, but
3 they have an active loan as well. So just want clarity on
4 if those people would get their pure Custody or Custody
5 under the 7,500 back.

6 MR. KOENIG: Again, Chris Koenig. Our position is
7 that there's a potential setoff between whether it's 7,575.
8 That's a different issue than the preference. So that's why
9 we --

10 THE COURT: -- different issue. We haven't -- the
11 Court has not dealt with the issue of loan and collateral
12 for loans.

13 MR. KOENIG: That's right, Your Honor, and that's
14 why we included that carveout in the motion that we filed.

15 THE COURT: That's not getting resolved today.
16 All right. I'm not going to hear from anybody I've already
17 heard from.

18 CLERK: There are a few people that had raised
19 hands, but they lowered them so I don't see anyone else's
20 hands right now.

21 THE COURT: Thank you. Thank you, Deanna. All
22 right. I think from the Court's standpoint, the most
23 important thing is you need to consult regarding the
24 schedule. Obviously, there are issues about orders,
25 returning some assets that are not really in dispute. It's

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1 an aggressive schedule and that's fine if you all want to
2 spend your Christmas, New Year's holiday doing all that.

3 If, you know, if you all come to an agreement for
4 any adjustments in the schedule, put it into a proposed
5 stipulation and give it to me. I've committed to moving
6 forward expeditiously. Okay.

7 MR. KOENIG: Wonderful. Thank you, Your Honor.

8 One last housekeeping point for tomorrow. I believe
9 tomorrow's hearing was initially noticed as a hybrid Zoom in
10 case this matter bled into tomorrow. Would you like the
11 hearing to be hybrid as well or to go back to --

12 THE COURT: No, I think we can go Zoom, but let me
13 raise this question now. So you filed three new Debtor
14 cases. And trust me, when I say I haven't looked at a piece
15 of paper or a computer screen dealing with three new cases.
16 When I approved bidding procedures, I -- my assumption was
17 because there was -- what was proposed to be sold was the
18 equity of non-Debtors held by, you know, directly or
19 indirectly by a Debtor.

20 And do I assume that what's happened now is the
21 buyer wants to buy assets free and clear and doesn't want
22 just the equity and so he filed three Debtor cases? Is that
23 kind of --

24 MR. KOENIG: That's exactly right, Your Honor.
25 That's to effectuate --

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1 THE COURT: And you really expect me to spend my
2 night reading all these papers and figuring out and
3 approving a sale tomorrow?

4 MR. KOENIG: Your Honor, we're happy to reschedule
5 --

6 THE COURT: We'll have a hearing, but don't count
7 on getting relief.

8 MR. KOENIG: Understood. Is this on the sale or
9 the first days or both?

10 THE COURT: I haven't even looked at -- all I've
11 done for days is read papers for yesterday, for Monday, and
12 today. You know, and I heard from my law clerks that they
13 got a call that Debtors were intending to file additional
14 cases. Then we weren't told which ones. Then we were told,
15 well, because of Israel, they -- not ready to file the cases
16 yet. Get them pushed.

17 And I saw on an email that I had three new cases.
18 So the cases filed. I haven't looked at a single page. I
19 presumed that what happened was the buyer wanted to buy
20 assets free and clear, understand why, okay. Was -- I don't
21 know, I mean, I'll ask these questions tomorrow or answer it
22 now. Did the auction provide bid on assets, bid on shares?
23 Was it a -- you know, was the auction process a fair
24 process? Did people know they could bid on some or all of
25 the assets, the equity?

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1 MR. KOENIG: Your Honor, from very early on in the
2 process, bidders indicated an interest in buying only the
3 assets because they wanted the free and clear order. And I
4 believe, and we can --

5 THE COURT: I don't remember what's in the bidding
6 procedures.

7 MR. KOENIG: Right, right.

8 THE COURT: Whether it said assets --

9 MR. KOENIG: But my understanding is --

10 THE COURT: I couldn't approve. They weren't
11 debtors so --

12 MR. KOENIG: Right.

13 THE COURT: The assets weren't the assets of the
14 Debtor.

15 MR. KOENIG: Right. But the buyers, the bidders
16 were aware from very early on that an asset sale was the
17 most likely outcome because that's what they indicated to
18 the Debtors that they were interested in, and of course,
19 they're the ones that are --

20 THE COURT: Surprise, surprise.

21 MR. KOENIG: -- writing the check. They're the
22 ones that are writing the check, so of course --

23 THE COURT: I understand that.

24 MR. KOENIG: -- we talked to them about that. We
25 talked to them about that structure, you know, for a very

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1 long time. I don't believe that anybody was surprised but
2 we're happy to -- I don't think that any bidder would be
3 surprised to say, oh I would have bid if I knew I could --

4 THE COURT: How many NDAs were signed?

5 MR. KOENIG: Your Honor, I don't have that in
6 front of me. I apologize.

7 THE COURT: Did every party who signed an NDA --
8 I'll ask this question tomorrow. Did every party who signed
9 an NDA know that they could also evaluate whether to bid on
10 assets, bid on stock, bidding on assets would in all
11 likelihood require that the Debtor cases be filed? Are
12 these -- is it a foreign Debtor in Israel? Is that --

13 MR. KOENIG: That's right, Your Honor, and there
14 would be a chapter -- there would be the equivalent of a
15 Chapter 15 recognition and proceeding in Israel.

16 THE COURT: In Israel.

17 MR. KOENIG: In order to recognize the sale in the
18 United States, and that's part of the reason for the timing
19 here, is of course we want the sale to close as promptly --

20 THE COURT: Have you laid it all out in a set of
21 papers that I can pull off my computer and --

22 MR. KOENIG: I believe it's in the papers that
23 were overnight and this morning.

24 THE COURT: I'll look at them, but no guarantee.

25 MR. KOENIG: Understand.

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1 THE COURT: I understand the reason for the -- how
2 many bidders were there?

3 MR. KOENIG: Your Honor, I --

4 THE COURT: Mr. Nash, how many bidders were there?

5 MR. NASH: Good afternoon, Your Honor. Pat Nash
6 from Kirkland and Ellis for the Debtors. Of course we'll
7 make this case tomorrow, Judge, but there was a larger
8 universe of initially interested bidders which came down to
9 then a very small universe of actual bidders. The evidence
10 tomorrow will suggest that all bidders understood the rules
11 of the road and what was available.

12 In light of Your Honor -- before we filed the
13 cases and this is, you know, an interesting case, came at
14 everybody so fast and came at the Court so fast that there
15 have been a few times where we've, the Debtors have started
16 down one direction and then, you know, recalibrated a bit
17 the issue that you heard so much about today being frankly
18 only one of those issues.

19 But as soon as the bidders and what became
20 actively, you know, written about in the press and whatnot
21 is this issue that, you know, where do the customers have
22 claims. Do the customers potentially have claims at GK8 and
23 so who the heck is going to buy the equity of GK8 only to
24 find out that they are liable for billions?

25 THE COURT: Yeah, that's why I say, surprise,

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1 surprise. They want to buy assets free and clear.

2 MR. NASH: Right. So Your Honor -- and we'll see
3 how it goes tomorrow in terms of, you know, just how abrupt
4 the notice is and what it is Your Honor has been able to
5 digest or not digest.

6 If it's not tomorrow, I think you'll be
7 comfortable that at some point soon thereafter, I do think
8 that we will be able to put on a case that as it relates to
9 the GK8 assets and the process, we have elicited the highest
10 and best value and, you know, frankly if Bill Gates or
11 somebody wants to show up with a suitcase full of cash, you
12 know, it's not final until we drop the gavel, but I think,
13 Your Honor, with the benefit of the hearing tomorrow, we'll
14 be able to satisfy your concerns.

15 THE COURT: Okay. I'm not making any promises.

16 MR. NASH: Understood.

17 THE COURT: We'll go forward with the hearing.

18 It'll be a Zoom hearing.

19 MR. NASH: Okay, Judge. Thank you.

20 THE COURT: Thank you, Mr. Nash. All right --

21 CLERK: Sorry to interrupt, Judge. We have a few
22 new hands.

23 THE COURT: No.

24 CLERK: I don't know --

25 THE COURT: It's over. I --

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1 CLERK: Okay.

2 THE COURT: All the issues as to which people are
3 entitled to be heard have been heard. We'll deal with -- I
4 had questions about the hearing for tomorrow. Those issues
5 will be taken up at the hearing tomorrow. I've expressed my
6 frustration at newly filed cases and the -- anyway. We're
7 adjourned.

8 MR. KOENIG: Thank you, Your Honor.

9 (Whereupon these proceedings were concluded at
10 11:03 AM)

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I N D E X

RULINGS

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5	Joint Stipulation, GRANTED	16	7
6	Motion to Return Certain Assets, DENIED	200	18

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

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Sonya M. Ledanski Hyde

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Sonya Ledanski Hyde

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Date: December 12, 2022